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Tagore Law Lectures—1894.

THE LAW OF FRAUD,

MISREPRESENTATION AND MISTAKE

IN

BRITISH INDIA.

BY

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PREFACE.

THE shortness of this volume, as it appears in print, seems to call for a word of explanation. It is due to the fact that I have treated at some length, in other published works, of the doctrines of English law which are the foundation and indeed the substance of the Anglo-Indian law considered in these Tagore lectures. Repetition of what I had already published, with or without some colourable disguise of form, would not have been a proper fulfilment of the duty I had undertaken to the University of Calcutta. Further and fuller exposition of the English rules as developed in recent English decisions would on the other hand have been of little use to Indian students, whom I could not safely assume to have more than an elementary knowledge of the subject. On the whole the most profitable method was to be sought, as it appeared to me, first in re-stating the settled principles in the simplest and broadest manner consistent with accuracy, and then in reviewing such parts of the Anglo-Indian Codes as embody those principles, and the decisions of the Indian High Courts on the Codes and on the general law. The main purpose has been to produce an introduction which may be found intelligible by students; at the same time I hope that practitioners in Indian Courts may find my work of some use as a clue to the authorities.

In this hope I am to some extent encouraged by the singularly defective state of the books of reference available in a search for Indian decisions. Although there has for many years been an official system of law reporting in all the High Courts, the only digest of cases is now five years in arrear, and there is no kind of supplement or current index, official or unofficial. Annotated editions of the Codes exist, but with very few exceptions are so meagre and irregular in their references to

adjudged cases as to be almost useless in that respect. In fact, no one can at present be sure of knowing what Indian decisions have been reported on any given point unless he has read or at least searched the whole of the Indian Law Reports for five years past. I must confess that I have not attempted any such feat, and that I should have been in danger of overlooking important cases of the last few years but for the frequent and ready help of my predecessor in office, Mr. Caspersz, and other learned friends of the Calcutta Bar, to whom I hereby return my best thanks. Fortified by that help, I venture to think that such collection and classification of Anglo-Indian authorities as I have been able to make will not be without practical utility within its range.

The book is offered as a book, not as a report of lectures; it is therefore divided into chapters according to the subject-matter, without regard to the original division required by the conditions of oral delivery. But, as it is intended for Indian use, it seems proper to retain such terms as "here" and "in this country" with their original application to British India.

Names of parties have necessarily been reproduced, for better or worse, in the spelling of the report cited. The variations of method, or want of method, in the usage of the High Courts often cause the same native name to appear in two or three different forms. It would seem desirable and not very difficult to find some generally acceptable middle course between the barbarous Anglicism of Calcutta and the purism, perhaps excessive for common purposes, of Bombay.

It has been thought needless to give references to more than one set of English reports, as only the Law Reports, to the best of my knowledge, are usually referred to in India, or in fact commonly accessible even in the Presidency towns.

F. P.

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CHAPTER I.

English Law in India.

The law of British India is not a simple or uniform system. It is a composite or mixed law. And it is mixed in a way which, for seven or eight centuries—we may say, roughly speaking, from about the date of the Norman conquest—has ceased to be familiar in Europe. Nowadays, Europeans think of law as something determined by place, something which a man must take as he finds it in this or that country. We expect the courts of a civilized country to administer the same rules to all persons subject for the time being to their jurisdiction, of whatever nation and kindred they be. This expectation is not recognized in the East, except where European authority or influence has introduced it. Nay more, it is reversed.

Law of British India still not uniform.

Asiatic law is still essentially personal, not territorial. A man does not find law where he goes; he carries his own law with him. It was so in Europe all through the early Middle Ages. There was nothing anomalous in the early position of the East India Company's settlements as insulated

Asiatic law is personal.

regions of English law in India. Continental merchants, Lombard and Hanseatic, had been in the same position in England down to the 16th century. Yet in the first half of the 19th century this medieval conception of personal law, which is still in full force in the East, had so completely passed out of men's minds that Lord Brougham actually thought India was divided into territories of Hindu, Mahometan, and Buddhist law. He said, describing the variety of laws existing in different parts of the British Empire :—

"In our Eastern possessions these variations are, if possible, greater; while one territory is swayed by the Mahometan law, another is ruled by the Hindu law; and this, again, in some of our possessions is qualified or superseded by the law of Buddha, the English jurisprudence being confined to the handful of British settlers, and the inhabitants of the three Presidencies."[1]

This statement, like others of Lord Brougham's, was curiously and laboriously inaccurate. Asiatic laws and customs know nothing of this neat and exclusive geographical parcelling. So far as there is any one dominant law in this or that Indian State, it is dominant, not as the law of the land, but as the law of the ruling dynasty or clan. The reference to "the law of Buddha" would seem to signify that Lord Brougham had been told the

[1] Speeches, Edin. and Lond. 1838, vol. ii. p. 357; Cowell's Tagore Lectures, 2nd ed. 148.

Burmese were Buddhists, and assumed that at one time they must have been some sort of Hindus. As the first Burmese war was still recent, Lord Brougham's survey would have been incomplete without a few words to show that Burma had not escaped his omniscience.

Personal and public Law.

The received Asiatic principle, so far as there is any principle, appears to be that, except in matters of State revenue and other public service, and except in criminal jurisdiction over offences condemned in all systems of justice, every man is governed by his own personal law, whatever that is. Hence the Imperial Government's policy of impartially respecting all customs consistent with public order, and not manifestly repugnant to existing rules of morality common to all civilized nations, is not only just and expedient in itself, but strictly in accordance with all Asiatic tradition of good government.

Such was, before our time, the policy of Akbar, the wisest of Her Majesty's predecessors on the throne of India; an Asiatic Prince with a systematic genius for government and enlightened ideas of toleration which put him not only above other Asiatic rulers, but above most European Princes of his time. India has many holy places: Akbar's tomb at Sikandarah, where Hindu, Musalman, Sikh, and Englishman can alike bow the head in reverence for a great and just man, is perhaps the holiest of all. While Europe was dis-

tracted by religious wars, Akbar was framing his splendid dream—a dream, but still splendid—of the Tauhid-i-Iláhi. But even Akbar could not substitute an imperial for a personal rule in matters of faith and custom. His illustrious failure was hardly needful to teach us that such an attempt is beyond human power. We have not only foregone it, but pledged ourselves against anything of the kind. If change comes, as in fulness of time it may, it must come of itself.

Imperial departments of British Indian law.

The law of British India is, in principle, still a system of personal laws, with a certain number of departments in which general Imperial laws have been introduced, either by express legislation or by judicial usage. Those departments are important and extensive; they are in course of being further extended. But there is still no general law of British India in the sense in which there is a general law of England or France or Italy.

What, then, are these Imperial departments? Broadly speaking, they are Criminal Law, Commercial Law, and what may be called the individualist parts of Civil Law. They answer pretty much, apart from Criminal Law, to what English lawyers call collectively the "law of personal property," omitting, however, all that has to do with succession to property on the owner's death. To these we have to add the whole law of Procedure and certain legislation (of which the chief example is the Succession Act) provided for the benefit and ease of people not under any recog-

nized personal law. These heads of general law, which constitute, so far as they extend, an inchoate Common Law of British India,[1] have been created in two kinds of ways :—

1. Direct legislation, notably the body of statutes known as the Anglo-Indian Codes.

2. Judicial introduction of English law where no other specific rule is applicable.

Legislation

We have no occasion to dwell here on the legislative powers and machinery of the Government of India. The Imperial Parliament is the ultimate source of all legislative authority now exercised in British India, and the principal Imperial statute now in force on the subject is the Indian Councils Act, 1861, with the earlier enactments which it confirms. We shall have to consider in more or less detail various parts of the Anglo-Indian Codes, and more especially the Contract Act (IX. of 1872).[2]

Judicial introduction of English law.

The judicial introduction of English law calls for some further remark.

The statutory and specific jurisdiction of the old Presidency Courts to administer English law expressly as such was confined to British subjects, whoever might be included in that description.

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[1] The Common Law itself was originally the law of the King's courts, not excluding a variety of local and even personal customs. The peculiar conditions of England enabled the King's judges and ministers to develop the primacy of the King's law into exclusive sovereignty much sooner than in other European countries.

[2] As to the application of the Contract Act to all persons in British India, notwithstanding anything in earlier Acts and charters, see *Madhub Chunder Poramanick* v. *Rajcoomar Das* (1874), 14 B.L.R. 76.

The power to administer the same justice in civil matters to all sorts of people within the jurisdiction seems to go back to Regulation III. of 1793.[1] The material sections are as follows :—

Ben. Reg. III. of 1793.

S. 7. All natives, and other persons not British subjects, are amenable to the jurisdiction of the zillah and city courts.

S. 8. The zillah and city courts respectively are empowered to take cognizance of all suits and complaints respecting . . . . debts, accounts, contracts, partnerships . . . . claims to damages for injuries, and generally of all suits and complaints of a civil nature, in which the defendant may come within any of the descriptions of persons mentioned in Section 7.

S. 21. In cases coming within the jurisdiction of the zillah and city courts for which no specific rule may exist, the judges are to act according to justice, equity, and good conscience.

It will be observed that even this was still applicable only to "natives and other persons not British subjects." The Regulation was finally repealed by the Bengal Civil Courts Act (VI. of 1871), which, however (S. 24), substantially re-enacts the provision in question.

"Equity and good conscience" had already appeared in the Charter of 1683, but this was confined to the Company's own people. It was a

[1] This Bengal Regulation was soon afterwards copied in the other Presidencies.

regulation only for the local and personal jurisdiction, in fact it was of the medieval type of which we have already spoken. We now have to see what was meant by the "justice, equity, and good conscience" prescribed in the Bengal Regulation as the general guide in cases of doubt.

"Justice, equity, and good conscience."

Let it be remembered that "natural" justice has never existed, and cannot exist, in a civilized country. It is not compatible with either certainty or equality in the administration of justice—perhaps the two most fundamental qualities of civilized law. One of the first demands of men living in any settled form of society is for a rule of law to secure them against mere caprice on the part of those in authority. They expect the decisions of the magistrates to be guided by some sort of fixed principles; that is, justice must at least aim at being certain. Likewise they expect the magistrate not to show arbitrary favour or disfavour to persons. There may be, in Eastern countries there always have been, different rules for different classes and conditions of men, but within the same class the rule has to be the same for one person as for another. Justice must at least aim at being equal. The really natural justice for Englishmen governing in India was to follow the rules they were best acquainted with. The only "justice, equity, and good conscience" English judges could and did administer, in default of any other rule, was so much of English law and usage

as seemed reasonably applicable in this country. Hindu and Mahometan law not affording any specific rules, or certainly none that were practicable for a mixed population, in a large part of the common affairs of life outside religion and the family, there was only English law to guide them. Thus the law of civil wrongs (among other branches) was practically taken from the common law of England; just as, if Germans had been set to do similar work, their basis would have been the Roman law received in modern German practice. We did profess in the mofussil, for a considerable time, to administer Mahometan criminal law. Macaulay's introduction to the first draft of the Penal Code records the difficulties of the attempt.

I have said that part of our subject-matter is covered by the Contract Act. But this Act only states in authentic form the results of exactly the same judicial process applied to the law of contract. Hence, we have to do strictly and wholly with Anglo-Indian law. Such principles or results as may be found in Hindu or Mahometan books are matter of pure ornament and curiosity.

Authorities on position of English law in British India.

The question to what extent English law has been received in British India, so as to become a law generally binding, is not without illustration from authority. It was much discussed in 1836, in *Mayor of Lyons* v. *East India Co.*[1] (the case of General Martin's charitable foundation at Luck-

[1] 1 Moo. Ind. App. 175; 3 St. Tr. N.S. 647.

now). Although the decision itself was limited to holding that certain specific parts of the English jurisdiction of the law of property were not and never had been binding in the jurisdiction of the Supreme Court of Bengal, the reasons given, and the arguments which prevailed, involve the conclusion that English law has never been imported into India as a whole; and that whatever parts of it are applicable must be so by virtue of some express legislation or specific principle appropriate to the matter in hand.

In a later case[1] an agreement had been made within the local jurisdiction of the Supreme Court of Madras, and as to land in the Presidency beyond those limits, between parties of whom some were Hindus, some Mahometans, one an Englishman, and one, it seems, an Armenian, and it was not shown that these parties had contracted with reference to any particular law. The Judicial Committee held that they could only be presumed to have contracted according to English law, being the law of the place where the contract was made, and not being inconsistent with any special local law of the place where the property in question was. This judgment was said in the High Court of Bombay, a few years later, to be "an authority of the highest Court of Appeal that, although the English law is not obligatory upon the Courts in

[1] *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (1862) 9 Moo. Ind. App. 303, 321.

the mofussil, they ought, in proceeding according to justice, equity, and good conscience, to be governed by the principles of the English law applicable to a similar state of circumstances."[1] With great respect for the learning and discretion of the Bombay Court, I am unable to see that the authority, as a positive authority, goes to any such extent. But I have already endeavoured to show that the "justice, equity, and good conscience" of the old Regulations could not in practice, if there was to be any settled system of justice, mean anything else than the analogies of English law. Doubtless, it was convenient that this reasonable and necessary tendency should, in course of time, be explicitly approved by a superior court; and the approval does not lose much, if anything, of its intrinsic value by professing to rest upon a judgment of the ultimate court of appeal which was really of less general scope.

The historical fact, in any case, was quite explicitly recognized not long ago in the Judicial Committee, where it was said that "equity and good conscience" had been "generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances."[2]

NOTE.—The preface to Smoult and Ryan's "Rules and Orders of the Supreme Court of Judicature at Fort William in Bengal,"

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[1] *Dádá Honáji* v. *Bábáji Jagushet* (1865) 2 Bom. H.C. 38.

[2] *Wághelá Rájsinji* v. *Sheikh Masludin* (1887) L. R. 14 Ind. App. 89, 96; I. L. R., 2 Bom. 551, 561.

Calcutta, 1839, p. ix, gives a list, taken from an earlier preface by Mr. Longueville Clarke, of all the heads to which the law administered by the old Supreme Court may be referred. The introduction of English law, common and statute, so far as Europeans are concerned, and within that jurisdiction, is attributed to the United East India Company's Charter of 1726, and this is stated to be the received opinion. And see Cowell's Tagore Law Lectures, 2nd ed. p. 13, and Sir James Stephen's "Nuncomar and Impey," vol. ii., ch. 9, where the introduction of English criminal law is discussed.

The case of *Borrodaile* v. *Chainsook Buxyram*, Hyde's Bengal High Court Reports, 51, where this list is cited (at p. 61), illustrates the troubles of working a system of personal laws in a modern commercial community. The Court held that it was not open to a Hindu defendant in a civil cause to rely on the Statute of Frauds; "The laws and usages of the defendant being laid down by 21 George III. c. 70, s. 17, as the rule to be followed in causes 'where only one of the parties shall be a Mahometan or Gentû.'" This was not quite ten years before the Contract Act superseded all reference to personal laws in matters coming within it, and abrogated the Statute of Frauds altogether for British India so far as relates to suits on contracts.

Discussion of the "substantive law to which all persons in the mofussil not subject to Hindu or Mahometan civil law should be subject" may be found in the Special Reports of the Indian Law Commissioners, Parl. Papers (H.C.), 30 May, 1843, B. No. vii. The conclusion of the Commissioners, after an elaborate review of the history and authorities, was that "so much of the law of England as is applicable to the situation of the people," and not inconsistent with express legislation, was and ought to be the *lex loci* of the mofussil. This report (which ignored the fundamental difference already pointed out between Asiatic and modern European ideas of law and jurisdiction) does not, of course, possess any legal authority. An attempt made in 1845 to carry out its recommendations by an Act was ultimately abandoned.

CHAPTER II.

FRAUD.

A.—OF FRAUD IN GENERAL AND ITS REMEDIES.

Civil not criminal law to be mainly dealt with.

WE have seen reason to expect that the law we have to deal with in this course will in the main be English law, in whatever form it may have been produced and have become authoritative in England; whether it was laid down in the exercise of ordinary jurisdiction by the old Courts of Common law, or developed under the jurisdiction, originally an extraordinary and as it has been called supra-legal one, of the Court of Chancery,[1] or defined and enlarged in recent years by the Supreme Court in which the formerly separated powers of common law and equity have been united since 1875. But it is not English law pure and simple. It is Anglo-Indian law, the law of England as received in British India, as applied in the first instance exclusively by the English Courts of the Presidency towns, and afterwards more generally,

[1] For the historical study of the laws of England it has to be remembered that other Courts besides the Court of Chancery acquired equitable jurisdiction in various ways. The "equity side" of the Court of Exchequer is the most important example. It is needless to dwell on this for the present purpose, or to analyse the elements of the jurisdiction exercised by the old Supreme Courts in India.

though still under their guidance, and as defined and modified by the Codes during the generation which has elapsed since the direct government of India was assumed by the Crown in Parliament. The Contract Act and the Specific Relief Act are the Indian statutes to which we shall especially have to attend. It is true that considerable parts of the Penal Code are more or less concerned with our subject. Mistake, as such, is evidently not among the matters which call for penal justice. Neither is Misrepresentation, save so far as it is accompanied with some form of Fraud. But Fraud, in many of its forms, operates in every civilized system of law, not only to discharge private obligations and give rise to private rights of suit for compensation or restitution, but to render the persons guilty of it liable to prosecution at the hands of the State, and the consequent punishment appointed for the offence in each case. Thus, in a large sense, the law of Fraud in British India may be said to include the offences dealt with by nearly thirty sections of the Penal Code (Chap. XVII., ss. 378-382 and 403-424). Nevertheless, I do not think it would be profitable for us to dwell to any great extent upon Fraud in its criminal aspect. The law of Fraud, as the term is commonly used in the profession at home and in America, is not understood to include the purely criminal law of Theft and allied offences. In fact, the part of civil law which is

most intimately connected with the questions arising out of that class of offences, and most necessary for their solution, is that which relates to Possession and Property rather than to Obligations; and there would be no great difficulty in justifying from a strictly scientific point of view the division which has been adopted for practical convenience by text-writers on both sides of the Atlantic. As regards British India, such peculiar conditions as exist in our case appear not to suggest any departure from this established usage, but rather to enhance the reasons for adhering to it. The Penal Code has been well and abundantly commented on by several learned authors. We may regret that so much of the extreme technicality of the Common Law was retained by its framers as we meet with in some of the definitions, and we may hope that greater simplicity will be attained in some future revision; yet the Code, so far as I am informed, is found in practice to work smoothly enough, and can well bear comparison with any other Code of equal magnitude in the fewness of the substantial doubts it has raised. On the whole, therefore, it seems advisable to consider the effects of fraud and the like chiefly with reference to civil rights and duties.

Fraud: difficulties of legal definition. Process of English equity.

Fraud is the name of something which has been denounced, and seldom superfluously, by moralists, judges, and legislators in all ages. "He that

worketh deceit shall not dwell within my house." The "wicked balances" and the "bag of deceitful weights,"[1] or more refined equivalents, are still to be heard of wherever business is done. Yet it has been found most difficult to define for legal purposes what Fraud really is. Escaping the coarser meshes of the old forms of action provided by the Common Law, it has been hunted out of one refuge after another by the refined ingenuity of English equity lawyers. As in the case of all innovations dictated by high-strung zeal for righteousness, the innocent have now and then suffered with the guilty. Persons who had acted with the best intentions and according to the best of their lights have found themselves answerable for commissions and omissions which were "in the eyes of the Court" equivalent to fraud. The severity of the English Courts in dealing with such persons in certain classes of cases, and especially with trustees, was, however, not due merely to excess of logical refinement in the application of the larger principles. In substance it was an endeavour, a generous one even if too ambitious, to maintain the highest possible standard of integrity and diligence in the execution of duties involving special confidence between man and man. At this day we have learnt a bolder and simpler method. Our Courts do not shrink from stating in affirmative terms what are the duties which they consider to

[1] Micah vi. 11.

attach to an office or undertaking once voluntarily assumed. Whatever is done or omitted against the rule is then a ground of liability, and for the practical purposes of men's affairs it matters little by what name the breach of duty is called. We no longer arrive at the conception of a trustee's or executor's duties by the circuitous method of saying that such and such must be the duty because the act or omission complained of is more or less remotely analogous to other acts of people in other situations which have been held to be fraud. But it was the enlargement of lawyers' ideas through the tentative and artificial process of equity jurisprudence which prepared the broader and straighter ways now open to us. That process was complicated by historical accidents of jurisdiction and procedure with which Indian students have little occasion to trouble themselves. Only it is good to remember that the persistent refusal of the Court of Chancery to define Fraud, which has become a commonplace in the modern books, does not signify any love of vagueness for its own sake, or any desire to exercise mysterious and arbitrary power. It was a precaution not only against the ingenuity of persons minded to keep themselves just on the windy side of the law, but against another sort of ingenuity, that of jealous and vigilant competitors for business; against unscrupulous ambition within the profession, and sometimes against the hostility of sincere but ignorant partisans in politics.

General notion of fraud or deceit.

Fraud may be described, for most usual purposes, as the procuring of advantage to oneself, or furthering some purpose of one's own, by causing a person with whom one deals to act upon a false belief. This is not a definition; we shall see that it is not an adequate description, for there may be fraud without any seeking of personal advantage. In fact, a short definition is not possible. Every part of the conception requires analysis and development. This we shall endeavour to supply, as occasion arises, in the following pages. Moreover, there are practices which, though constantly on the verge of actual deception, and often including it in fact, are such as make the full proof of the facts exceedingly difficult. A person who has been brought into a chronic state of dependence upon another who has no lawful claim to his obedience or moral claim to his bounty, a state that is in truth one of chronic illusion and deception, cannot be said to have been deceived on one occasion more than another. Hence the doctrine of what we know in England as Undue Influence has received extensions and refinements which indeed are artificial; which in some cases have endeavoured, perhaps, to make a closer approximation to perfect justice than is allowed to the instruments at the disposal of human tribunals; but which err, if they have erred, on the nobler side. A rude condition of society needs broad and plain rules

enforced, if possible, by swift and impressive execution.[1] When men's affairs have become complex, when the hands of the law are in the main too strong to leave much hope to violence, the time comes for evil-doers to take refuge in subtle devices and circumventions. Then it is better for the law to take the risk of being over-subtle than to acquiesce in being ineffective.

Remedies: restitution or compensation.

Considered with respect to the remedies that can be applied, Fraud has, like other civil wrongs, a double aspect. We may aim at specific relief or restitution, the replacing of the party who has been wronged in the position he would have held if the fraud had not been committed, with the rights and lawful advantages incident to that position, and of which he has been deprived, or would have been deprived if the fraud had not been discovered in time, and the appropriate process of law set in motion. Right will then be done by undoing the wrong so far as possible. A judgment ordering the repayment of purchase-money in exchange for the reconveyance of immoveable property which the vendor has passed off on the purchaser by fraud may be taken (in England at any rate) as a typical and important example of this procedure. The

[1] In point of fact this condition is seldom fulfilled in a half civilized commonwealth, save now and again under an exceptionally vigorous ruler, such as Ranjit Singh.

converse case of a fraudulent seller being held to "make his representation good," as the phrase goes, is specially dealt with in the Indian Contract Act (s. 19). But this, as we shall see presently, is not a special remedy against Fraud. Again, the simple and unqualified restitution of gifts obtained by fraudulent practices has often been decreed. Except in this last-mentioned class of cases, the advantage which has been unduly taken has generally been taken under the form of a contract; sometimes, though rarely, under the mere pretence of it; so that, for example, an apparent seller of goods has never ceased to be the true owner even as against innocent third persons. Accordingly the Court has to decide sometimes whether there is any true contract at all, often whether a contract which has really been made is conclusively binding on the party seeking relief. And where this has to be done, it must be done before any question as to the proper manner and conditions of restitution can be entertained. Hence the rules which govern the rescission of contracts really govern, to a large extent, the law of specific restitution as a remedy applicable to cases of Fraud. Provisions as to the rescission of contracts have, therefore, an appropriate place in the Specific Relief Act. Those provisions,[1] as I read them, do not alter the substance of the doctrine received in England and other juris-

[1] Act I. of 1877, ch. iv., ss. 35—38.

dictions where the Common Law is in force. They are stated to be taken for the most part from the draft Civil Code of New York,[1] an ambitious and unsatisfactory composition which has had an evil influence on the Indian Codes in more than one place; but in this case, although the workmanship would not for a moment pass muster either in the Parliamentary Counsel's Office or in any good conveyancer's chambers in England, I do not think the New York codifiers have succeeded in introducing any blunder or confusion which cannot be rectified by reasonable judicial interpretation.

Specific relief an *equitable* remedy in England: *damages* in common law jurisdiction.

The form of redress we have just spoken of was fostered and developed in the jurisdiction of the Court of Chancery. Quite distinct from this was the remedy almost exclusively administered by the Courts of Common Law, the King's Courts, whose seat was fixed at Westminster, and whose rules had become technical long before the relief given by the Chancellor was commonly thought of as a regular part of the judicial system, or allowed by the king's ordinary judges to be anything but a branch of his extraordinary prerogative, and a branch whose growth should be rather jealously watched. Not restitution but compensation, not specific relief but the award of damages in money, was the usual remedy administered by courts of common law jurisdiction, as indeed it still is. We

[1] Whitley Stokes, the Anglo-Indian Codes, i. 974.

need not stop to mention the exceptional cases in which the old Superior Courts of the King's Bench, Common Pleas, and Exchequer, had an original power of issuing direct and specific orders. They did not occur in the ordinary course of civil proceedings,[1] and do not require our attention, so far as I am aware, for any purpose connected with the present subject. Broadly speaking, damages are the normal and only remedy available in a Court administering English common law as distinct from equity, and not having acquired enlarged powers either by the addition of equitable jurisdiction in general terms, or by more specific enactments. Damages are, so to speak, an *ex post facto* remedy. They are not intended to satisfy the successful plaintiff by restoring the state of things which existed before the wrong was done, but to make up to him the amount by which he is actually the worse off in consequence of the defendant's wrongful act. Commonly these two modes of computation will work out to identical results, or to results which cannot be distinguished for any practical purpose. But they sometimes lead to palpably different results. Thus, where a tenant has wrongfully removed part of the soil from his holding, the measure of damages is not the cost of restoring the ground to its former con-

[1] *Cf.* Pollock on Torts, 3rd ed. 166, *n.*

dition, but the extent to which the value of the landlord's interest in the land is diminished.[1]

Compensation in damages the normal form of redress in English law.

It is material to notice that even in the view of an English court of equity compensation in damages is the natural and normal form of redress. The constant maxims of the Court of Chancery, derived from the historical conditions under which its jurisdiction had grown up, was that specific relief should not be granted where the relief in damages was adequate; and the Specific Relief Act, in s. 21 (*a*), has expressly confirmed this rule for British India. In some European countries, notably Germany,[2] where the history of law and procedure has been different, the presumption is the other way, and the Courts award money damages only when specific performance or relief is impossible or inappropriate. An important consequence, in our present subject-matter, of the general English doctrine of legal redress is that there is no actionable fraud without proof of actual damage, that is, of harm or loss on which an appreciable money value can be set. An action of deceit for nominal damages is not known to English, nor therefore to Anglo-Indian law. It is a wrong to damage one's neighbour by deceit, but

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[1] *Whitham* v. *Kershaw* (1886) 16 Q. B. Div. 613.

[2] In France the property in immoveables as well as moveables passes at once by the contract of sale. Specific performance, as we understand the term, is therefore not required in ordinary cases.

there is not any absolute right not to be deceived in the sense in which there is an absolute right not to be defamed. This last-mentioned right is itself of comparatively recent origin, and is something of an anomaly in English law. Perhaps it may be a fair subject of discussion whether it be on the whole a beneficial one either at home or in British India.

Practically we have: Suit for damages; suit for rescission; special defences to suit on contract.

On the whole, therefore, the form in which fraud is complained of in a civil court of justice either at home or in British India, will in the great majority of cases be either an action for damages, or an original suit to set aside a contract alleged to have been obtained by fraud, or a special defence, on the ground of fraud, to a proceeding in which the other party is seeking to enforce the contract.

The rules applicable to such proceedings are in truth, to a great extent, examples of broad principles which govern not only these but other classes of cases, and which, when they are once fully grasped, may be perceived to be simple, and indeed to be necessary, under one form or another, in any system of law that aims both at the repression of dishonesty and at the exact performance of just obligations. On the one hand fraud must be made unprofitable; on the other hand innocent parties are not to be disappointed of their lawful and reasonable expectations because other persons have committed frauds. The complete and concurrent attainment of both these ends is a counsel

of perfection which the Common Law cannot be said to have fulfilled, even in its latest and most refined condition. At the same time I am not aware that any other system has succeeded better; I doubt whether any other has on the whole succeeded so well. I will mention here that a considerable argument for the justice and convenience of our English rules in these matters may be drawn from their substantial coincidence with the Roman; I say coincidence, for I do not believe there has been any appreciable borrowing. The coincidence which may be remarked is by no means confined to generalities. It appears in the method of handling specific legal problems, and it is quite possible to find the same opinion given on essentially similar facts by a Roman lawyer of the second century and an English judge of the nineteenth. However, this mention is now made once for all. It would not serve any good purpose, in my opinion, to refer frequently, in a work founded on a course of lectures given in British India, and intended chiefly for Indian students, to a system in which the great majority of those students cannot be expected to take either a practical or an historical interest. Roman law cannot be understood without at least a fair knowledge of Latin. And the Latin language cannot well become an object of general study in a country already possessing, or having intimate associations with, three classical languages, of which two are at least as difficult as

Greek or Latin, and moreover having an extensive ancient legal literature of its own. Exotic studies will attract a certain number of special students in every country where the general standard of well-being and education admits of it; but exotic they must remain.

Fraud as substantive cause of action: deceit and damage.

Let us consider Fraud or Deceit, first as a cause of action, a substantive wrong leading to reparation in damages. The essence of the wrong is damage, actual harm, resulting from deceit.[1] Neither deceit without damage, nor damage without deceit, will establish the right to redress. An unsuccessful attempt to deceive is morally as bad as a successful one, but it does not constitute a civil wrong, because no harm has been done. A seller of goods patches up a flaw with the view of evading a possible inspection by the buyer, but the buyer accepts the thing sold without any inspection at all.[2] Here the seller has done a dishonest act, and it may be that he is answerable to the buyer under a warranty, express or implied, that the goods are fit for the purpose for which they are sold. This responsibility, if it exists, is part of the obligations incident to the contract of sale, and has nothing to do with the honesty or otherwise of the seller's conduct. He

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[1] *Pasley* v. *Freeman* (1789) 3 T. R. 51; 1 R. R. 634.

[2] *Horsfall* v. *Thomas* (1862) 1 H. & C. 90; 31 L. J. Ex. 332. The decision has been criticized, but, with all respect for the learned critics, it seems clearly right.

might be liable upon it even if he had been not only honest but diligent. But as regards the particular deceit he has attempted, it has been fruitless in fact, and is therefore immaterial in law. The seller has no more actually deceived the buyer than a man who fires at another and misses has actually shot him. In short, the fraudulent party's falsehood must have been uttered to the intent that the party defrauded should act upon it, else there would be no deceit; and the defrauded party must have believed the falsehood, and acted upon it in the manner contemplated, else there would be no damage. By falsehood we mean for this purpose a statement which is in fact untrue, and which the person making it does not believe to be true. The precise meaning and extent of this limitation, which has been a matter of some controversy in England, will be best considered separately.

Simplicity of the fundamental principles.

Subject to this reserved question, the principles now stated are abundantly established by the unanimous consent of all modern authorities. It is believed that they are the only fundamental ones, and really suffice for the determination of the minor rules which have to be expressed in general terms as a matter of convenience. Thus a man cannot complain of deceit if he has not been deceived; that is to say, if a fraudulent statement otherwise capable of affording a ground of action has never been communicated to him, or (as in

the case just mentioned) he has never made the inquiry which a fraudulent practice was designed to guard against; or if, notwithstanding a fraudulent communication, he took his own measures to verify the facts, and acted on his own judgment of them:[1] if any of these things be proved, there has not been fraud, but at most an attempt to defraud. Full proof is naturally required. On the other hand, a man who has trusted another's falsehood to his own damage is not the less deceived because he had other means of ascertaining the truth, and, having full confidence in the fraudulent statement, or for any other reason, does not use them. He is entitled to rely on the statements made to him by the other party to the very intent that he should rely upon them. And this is by no means very modern law, still less a refinement of equity. It was asserted in the first quarter of this century as a rule of pure common law.[2] A question is possible in British India whether the rule is affected by the exception to s. 19 of the Contract Act (IX. of 1872). We shall have to attend more closely, on their own ground, to the group of sections of which this is part. However, the terms of this clause do not appear to

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[1] See for a recent example the American case of *Farrar* v. *Churchill* (1890) 135 U.S. 609.

[2] *Dobell* v. *Stevens* (1825) 3 B. & C. 623. In equity somewhat earlier; *Dyer* v. *Hargrave* (1805) 10 Ves. at p. 510; 8 R. R. 36, 39 See further *Redgrave* v. *Hurd* (1881) 20 Ch. Div. 1.

cover cases of active and wilful fraud; and, in fact, the High Court of Madras held in a recent case, which was deemed on the facts to be one of wilful concealment, that the exception was not applicable.[1]

Fraudulent falsehood need not be communicated *directly* by defendant to plaintiff.

We have said that the falsehood which gives rise to an action for deceit must have been uttered by the defendant with the purpose of being acted on by the plaintiff. We have not said that it need be communicated directly to the plaintiff by the defendant, and it need not be. If A buys goods of P for the use of Z, and P knows for whose use they are, and passes off inferior or dangerous goods by a fraudulent assertion about them, P may be liable to Z for any ill consequences. It makes no difference to this liability whether P is or is not also liable to A under the contract of sale or a warranty annexed to that contract. The two grounds of liability are consistent, but distinct and independent; and the result of an action brought by A against P would not be binding in an action brought by Z. This is the point decided in the well-known case of *Langridge* v. *Levy*.[2] It is of some interest to note that the decision comes from a time when the Common Law is supposed to have been more technical than it has been at any time before or since. Even in its

[1] *Morgan* v. *Government of Haidarabad* (1888) I. L. R. 2 Mad. 419. See the judgment at p. 439.

[2] (1837) 2 M. & W. 519 : 4 M. & W. 338.

most technical days there have been memorable decisions in which the judges made subtilty the handmaid of common-sense and good conscience.

Another point has to be carefully noted in order to avoid an unduly narrow view.

Intention to injure the party defrauded not a necessary element in fraud.

In order to make out a case of actionable fraud, it is not necessary to show either that the defendant intended to injure the plaintiff, or that his motive was the acquisition of gain for himself. He may make a false statement for the benefit of a third person, out of what is called good-nature; he may even think that he is acting for the benefit of all parties concerned. But no man is entitled to expose his neighbours to risk of this kind. It is a large and far-reaching principle of all civilized jurisprudence that a man is held answerable, not only for such consequences of his acts as he intends and foresees, but also for such as a commonly prudent man in his place would foresee; for the "natural and probable" consequences, as we are accustomed to say.[1] "It is fraud in law if a person makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad: the person who makes such representations is answerable for the consequences."[2]

Thus it is fraudulent to give a good character to

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[1] I have endeavoured to develop and illustrate this in my work on the Law of Torts, Ch. II.

[2] *Foster v. Charles* (1830) 7 Bing. 105, 107.

a dishonest clerk, and thereby enable him to get a place under a new employer whom he proceeds to rob.[1] Such injury to the employer who takes the dishonest servant on the faith of the false character is not intended nor desired: probably the first employer hopes that the servant may have had sufficient warning, and will reform. But if he does not, the damage suffered by the new employer is a natural and probable consequence of the falsehood, and the man who has indulged a perverse view of charity at the cost of justice and good faith must pay for it. A man who accepts a bill as agent for a person at a distance, knowing that he has not authority, but expecting his act to be ratified, thereby represents to all subsequent holders of the bill that he had authority. This, although there was no bad motive, and the defendant thought he was merely expediting an ordinary piece of business, is a wilful falsehood; and the well-meaning assumer of a fictitious authority is liable to an action for damages at the suit of a holder for value to whom payment is ultimately refused by the supposed principal. "He stated what he knew to be untrue, though with no corrupt motive."[2] Wilful departure from what is known to be the truth

[1] *Foster* v. *Charles* (1830) 7 Bing. 105.

[2] *Polhill* v. *Walter* (1832) 3 B. & Ad. 114, 124. The law of this case, as mentioned in the text, stands clear of *Derry* v. *Peek* (next page). How the facts of *Derry* v. *Peek* were more favourable to the defendants than those of *Polhill* v. *Walter* is very hard to see.

of the matter is not excused by a desire or expectation that what is not true at the moment may become so in time for no harm to ensue. This rule is, I believe, settled law. It is not affected by the questions that arise in cases where the statement is not, at the time of making it, positively known to be untrue.

Equitable extension of suit for deceit cut down by decision of H. L. in *Derry* v. *Peek*.

Before we go on to deal with the rescission of contracts, it should be mentioned that there was formerly a class of cases in which Courts of Equity had arrived, by their own independent methods of enforcing restitution, at what was equivalent in practice to an action for deceit with a liberal measure of damages. I refer to the cases of which *Burrowes* v. *Lock*[1] is the type. It was held that a man who suppressed material facts once within his own knowledge, and which he had made it his business to know, could not discharge himself from being held guilty of fraud, or at any rate incurring the same consequences, merely by alleging that, at the time of the transaction complained of, he had forgotten that which he should have known. But these authorities, after being received without question for the better part of a century, have since 1889 been either overruled or cut down to peculiar decisions on peculiar facts by the judgments of the House of Lords in *Derry* v. *Peek*,[2] and

[1] 10 Ves. 470; 8 R. R. 33, 856.
[2] 14 App. Ca. 337.

the application since made in the Court of Appeal[1] of what was there laid down. These judgments are of course binding in England. Their position in British India will be considered later. For the present we leave this head of specific relief aside, as being too doubtful to be included in a general view.

Rescission of contracts: Specific Relief Act. Necessary conditions.

With regard to the rescission of contracts, the Specific Relief Act, ch. iv., declares the general powers of British Indian Courts. Most of the rules by which the exercise of those powers is guided must be sought either in the Contract Act (see especially ss. 64, 67) or in English and Anglo-Indian authorities outside the Codes.

There are two distinct and essential elements in the rescission of a contract, besides the preliminary fact that a contract exists which is binding unless and until rescinded. Where there is not really a contract at all, there is nothing to rescind. The difference is much easier to overlook in practice than appears from the statement of it in an abstract form. We shall see more of this under the head of Mistake. Where there is a contract which can be rescinded, the party seeking relief desires two things. He wants to be discharged from any future performance of the obligations he has contracted; he wants also to be indemnified

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[1] *Low* v. *Bouverie*, '91, 3 Ch. 82; *Le Lievre* v. *Gould*, '93, 1 Q B. 491.

against any loss he has already subjected himself to by acting on the contract. So long as only the original parties are concerned, there is no great difficulty in working out these principles A party may indeed deprive himself of the right to rescind a contract, or, in technical English language, conclusively determine his election to affirm it, by acting upon the contract as valid after all the facts are known to him. To take an extreme case, a man cannot bring a suit to enforce a contract, and then, upon the same facts, turn his suit for enforcement into a suit for rescission, or abandon it and bring a fresh suit for rescission. A buyer of goods cannot re-sell the goods and put the price in his pocket, and then seek to set aside the contract of sale against the original buyer without having any newly discovered ground for holding it voidable: not even if he can arrange with the subsequent buyer from himself to get the goods back and be able to restore them. In such a case, however, it would generally be impossible for the party desirous of rescission to restore the former state of things: and on this distinct ground, though it is really a branch of the same principle, he cannot avoid the contract, in England at any rate. As an English judge expressed it in a proverbial form, "You cannot both eat your cake and return your cake."[1] The

[1] *Clarke* v. *Dickson* (1859) E. B. & E. 48, 152.

Indian Contract Act is less explicit than might be desired on this point. We read in s. 64:—

I. C. A., s. 64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor.

This is correct and obvious. The next sentence is:—

The party rescinding a voidable contract shall, if he have[1] received any benefit thereunder from another party to such[1] contract, restore such benefit, so far as may be, to the person from whom it was received.

Here it does not appear what the rights of the parties are to be in a case where restitution is impossible. One can only say that the general intention of the Act, as appearing from its contents as a whole, is to "define and amend" (in the words of the preamble) the Anglo-Indian law of contract as administered by the High Courts: that is, to codify the substance of English law with such alterations as seemed to the framers to be called for by the circumstances of British India. Now the framers of the Act have shown in several places (notably in dealing with the rules as to consideration and with the sale of goods)

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[1] This use of the subjunctive is now abandoned by most draftsmen: "has" would really be better English, and certainly clearer. Many draftsmen now prefer "the" or "that" to the wearisome "such" of old-fashioned deeds and statutes.

that when they meant to depart from the law of England, they were quite capable of expressing that meaning clearly. Doubtless they knew that the High Courts would, by no means improperly, tend to follow the existing law and practice in case of doubt; and therefore they on their part wisely and properly took care to make their amendments unmistakeable. In addition to this, the Act does not profess to be a complete code of the subject.[1] Hence the mere omission of a minor or qualifying rule of the Common Law can hardly be taken as indicating any intention to abrogate that rule. On the whole, I submit that the law of British India does not differ from the Common Law on the point in question.

Intervening rights of third persons.

Still more important is the limit set to the right of rescission by the claims of third persons who have acquired rights in good faith and for value under a voidable contract. Such persons are in a position analogous to that of a possessor in good faith. In many cases, as where the disputed contract is one of sale, they may in fact have acquired both possession and property. Rights so acquired cannot be disturbed. Most of the English decisions on the point belong to the law of joint-stock companies, a branch of commercial law which has now become so highly specialized as to be hardly intelligible to beginners, and not much understood even by a great proportion of those

[1] See the preamble and Mr. Whitley Stokes's note.

lawyers who have not specially studied it. There is no doubt, however, as to the generality of the principle.

There are cases where there is only an external appearance of contract but no true contract at all. These have to be treated differently. We have already mentioned that they will be taken up later under another head. Strictly speaking, they are cases not of Fraud, but of fundamental Mistake induced by Fraud.

Loss of right to rescind by acquiescence: in India definite term by Limitation Act.

Further, it must be remembered that when there has elapsed a time, greater or less according to the nature of the case, after the true facts are known to a person entitled to relief against a transaction to which he is a party, his inaction will be sufficient evidence that he affirms the contract. This is what is meant by "acquiescence" in the Common Law. The Indian Limitation Act, however, has cut the knot of the various questions which may arise in this connexion by confining suits for the rescission of contracts within a term of three years, measured from the time "when the facts entitling the plaintiff to have the contract rescinded first became known to him."[1]

It will be observed that under the Indian Act it is the duty of the Court to dismiss any suit brought out of time, even "although limitation has not been set up as a defence." This is a

[1] Indian Limitation Act (XV. of 1877), Sched. 2, No. 114. The operative enactment is in s. 4 of the Act.

deliberate and express departure from the English rule, and substitutes a fixed and positive rule of law, a true prescription, for a mere privilege of the defendant which may be waived as a matter of magnanimity or policy, or lost by neglecting to claim it. I see no reason to doubt that the departure was a wise one.

Some doubt seems to be entertained, however, in this country with regard to the analogous limitation of suits for specific performance (Sched. 2, No. 113). It has been thought that although such a suit will in no case lie after the prescribed term of three years, there may still be cases in which delay for a shorter time may be a bar. The High Courts of Calcutta and Madras have expressed different views on this point,[1] which, however, was not decided by either of them. It seems to me that the object of Statutes of Limitation is to exclude all indefinite questions of this kind, one way or the other, not merely in the interest of defendants but in the interest of suitors at large and of the public. The distinction which has been suggested appears directly calculated to frustrate the purpose of the legislature in fixing a certain term. Even if it were sound, it could in any case be supported only on the ground that in England the remedy of specific performance has always been

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[1] *Rama Rau* v. *Raja Rau*, 2 Mad. H. C. 115; *Mokund Lall* v. *Chotay Lall*, I. L. R. 10 Cal. 1061, 1067. See Whitley Stokes, the Anglo-Indian Codes, i. 933.

in a peculiar manner in the judicial discretion of the Court granting it, and has not been treated as a matter of common right, and that the Specific Relief Act, s. 22, preserves this discretion. The question is whether the Limitation Act does not take it away on this particular head. Arguable or not, the contention appears to be clearly inapplicable to the case of rescinding a contract.

B.—The Relation of Fraud to Negligence.

A controversial point reserved.

We now take up a point which was expressly reserved above in order not to break in upon the general presentment of the subject by entering on matters of refined controversy. The question is settled in England, indeed, for the present, but not without considerable difference of judicial opinion; and a legislative correction of what is now declared to be the common law rule in one of its most important applications followed close upon the judicial decision.

Element of moral blame in Fraud.

Fraud has always been understood, in any serious use of the word, to imply some degree of real moral blame. A man may incur legal liabilities in many ways without his personal character being affected for the worse. He may be prevented from performing his contract by some accident or misfortune which no good intentions and even no prudence on his part could have averted. He may

come, as an occupier answerable for the safe condition of a building or the like, under those very peculiar and stringent duties imposed by the Common Law to an extent unknown in any other system, the nature of which I have endeavoured to elucidate elsewhere,[1] and which are duties not so much of diligence as of insurance. Nay more, he may be answerable, as principal, for the actual frauds of agents who, in the course of doing his business, have committed such acts in his supposed interest, but without his authority and even against his will. This last form of risk to personally innocent parties has really nothing about it that is peculiar to the law of Fraud or Misrepresentation. It may be connected with almost any kind of wrong; it has constantly taken effect, not only against natural persons but against corporations; and the principle is either certainly or according to the better opinion applicable in some cases and under some conditions of fact raising, perhaps, greater difficulties than any which in ordinary cases of fraud occur either to natural or to legal reason. I refer to the authorities on assault, false imprisonment, and malicious prosecution

"Constructive" Fraud.

We have again, or rather we have had in England, apart from the broad and universal doctrine of a principal's responsibility for the acts and defaults of his agent, cases of what is called Construc-

[1] In my book on the Law of Torts.

tive Fraud, where Courts of Equity thought it necessary or beneficial to find a remedy for breaches of particular kinds of duty by bringing them within the general equitable jurisdiction in matters of fraud. This they did by declaring that such defaults or omissions would entail like consequences with fraud; not because they were fraudulent, for then there would have been no occasion to extend the jurisdiction or use artificial terms: but although these defaults or omissions were not actually fraudulent, and in order that complete justice might be done. The epithet *constructive* excludes any judicial imputation of actual fraud; and such is always, to the best of my knowledge, the correct usage of that epithet as a legal term of art. Students are often puzzled, in much the same way, by Constructive Possession and Constructive Notice. It looks at first sight as if a man could be in possession and not in possession, and so in the other cases. But there is not in truth any contradiction or mystery. The very meaning of constructive possession is that some one who is not in possession is allowed, for reasons of convenience, to exercise the rights, or some rights, of an actual possessor. The very meaning of constructive notice is that some one who has not (whether in person or through his agent) knowledge of a certain state of facts, or at any rate cannot be proved to have it, is treated as if he did know that state

of facts.[1] What English writers have usually called "contracts implied in law" are *constructive contracts* in exactly the same sense; and I know of no reason why we should not use the term except that it might not be generally understood. It would be more conformable to the language of English lawyers, and would throw more light on the substantial analogies of the law in different branches, than the rather doubtful compound word *quasi-contract* which is now becoming common.[2] The old-fashioned "constructive frauds" on which Courts of Equity founded a beneficial jurisdiction (for on the whole it was beneficial) have however been absorbed in the more systematic and specific declaration of positive duties, as I hinted in the former part of this chapter.

We have no reason for wishing to see re-introduced in this country an ingenious but highly artificial method of arriving at just results which has already done its work and lies honourably buried in the foundations of more simple and direct ones. In the same way complex mechanical devices have, in every branch of invention, been supplanted by other and more straightforward

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[1] It is only too easy to confound *constructive* notice with notice *through an agent*; but it is most important for students who wish to keep their heads clear to avoid this. Notice to an agent, by which his principal is affected, may itself be either actual or constructive.

[2] We cannot speak in Latin of *quasi contractus* or *quasi delictum* but only of *obligationes quasi ex contractu* or *quasi ex delicto.*

ones, which, once being there, look as if they ought to have been much more obvious. Whether we take the history of the steam-engine, or of fire-arms, or of writing materials, we shall find the same rule hold. Any one who should attempt to revive here the phraseology of such books as Story's Equity Jurisprudence would in my opinion be doing a very ill turn to the jurisprudence of British India. He would be like a military antiquary who should seek to bring back wheel-lock pistols into the service. But it was needful to mention the old forms of speech to this extent in order to clear the ground. The question whether negligence can be so culpable as to amount to fraud appears to me to have nothing to do with fictions or constructions of law, beneficial or otherwise, but to be a distinct question of substance, involving moral as well as legal appreciation of definite conditions.

Character of statement as determined by knowledge or belief.

There is no doubt that it is fraud to serve one's own purposes at another man's cost by inducing him to act on a statement of pretended facts which is not true, and which is not at the time believed to be true by the person making it. On the other hand there is certainly no fraud when a man states as fact that which at the time he believes to be true, and so believes on reasonable grounds, though it may turn out not to be true.[1] Two cases may seem to be intermediate. The

[1] *Collins* v. *Evans* (1844) 5 Q. B. 805, 820, 13 L. J. Q. B. 180, in Ex. Ch.

first is where a man asserts as fact something which he does not know to be false, or perhaps does not believe to be false, but which he does not know or believe to be true: where, in short, a positive assertion is made by a man who wishes others to believe it, but has not any information or belief of his own at all, and takes the chance of the matter being true or false. This case is held to be only a particular variety of the general and ordinary type of fraud. Want of honest belief in the truth of what one asserts, not positive knowledge that it is false, is the essence of the wrong. A man who knows that he is making a reckless assertion about things of which he really knows nothing may not be speaking against his own belief, but he is not speaking according to it, and therefore his conduct is dishonest, and is esteemed fraud by the law.[1]

Belief without any reasonable ground.

The case that remains is the troublesome one. What of the man who makes an untrue statement and believes it at the moment, but, so to speak, only just believes it? He thinks or supposes it is true, but he has taken no pains to verify what he supposes, and the least real inquiry would show that the fact is the other way. Yet he carelessly risks a positive assertion, on which other persons act, it may be, to their own great loss. Can a

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[1] L. R. 4 H. L. at p. 79; Lord Herschell in *Derry* v. *Peek*, 14 App. Ca. at p. 371.

statement made in a matter of business, without any regard for the consequences to others, without any sort of reasonable ground for thinking it true, be called honest? Can it be put on the same footing with the statement of a man who has been diligent to ascertain the truth, although his diligence has not been successful? So much controversy has actually been raised by this question that there can be no doubt of its difficulty.

Relation of point of law to question of fact. want of ground for belief is at any rate evidence of no belief.

Perhaps it may be thought strange that this refined point of law was not evaded by the Courts. Whether a man's assertion is true or not is a question of fact. It is no less a question of fact whether he really believed his assertion to be true at the moment when he made it. And the absence of any reasonable or plausible ground for making an assertion is evidence that the maker did not really believe it. Not conclusive evidence indeed, but some evidence at least, and (one might have been inclined to think) sufficient evidence in almost every case of practical importance. A man's own assertion of what he believed, or recollection of what he thinks he believed at a certain time, is worth very little without some kind of confirmation from the external conditions. If the moon was full in a clear sky last night, and we know that a certain man, having the use of his eyes, was out of doors when the moon was up, and he declares that he did not believe that the moon was shining, our natural course, unless we know him to

be a man of singular veracity, is to pay no attention whatever to such a story. There was nothing in the traditions or habits of the Common Law to prevent the formation of a rule of evidence, or what Courts of Equity have sometimes called a rule of judicial prudence, to the effect that a man's assertion as to what was his own belief at a certain past time shall not be accepted without corroboration. Obviously the best and most natural corroboration would be found in circumstances showing that the alleged belief was such as, with the means of knowledge then at hand, a reasonable man might have entertained at the time. In fact it is admitted in England, even now, that the total absence of reasonable ground for making a statement is evidence, and may be sufficient evidence, that it was not made with any real belief in its truth. Unhappily, as I venture to think, the development of English judicial practice on these lines has been checked, partly by a view of the actual rules of law which, as it was not that of the Court of Appeal, can hardly be called necessary; partly by a natural and humane endeavour to deal gently with respectable persons who had got themselves into an awkward place by making themselves answerable for the professional fictions of company promoters; an endeavour which, however natural and humane, has led the House of Lords to give one more striking illustration of the adage that hard cases make bad law.

The point of law decided in *Derry* v. *Peek:* no general duty of diligence in verifying one's representations.

The Court of Appeal in England had decided, in effect, that people who put forth positive statements, as of matter of fact, in order to procure other people to act upon them in the way of business, are bound to use some sort of care to verify them, and that a mere naked belief in the truth of such an assertion, a belief destitute of all reasonable grounds, is in point of morality and honesty little better, if at all, and therefore, in point of law, is not better at all, than the reckless absence of all belief or knowledge whatever. Such absence of belief or knowledge has long since been held sufficient to stamp a materially false representation with the badge of fraud. It would be useless to review the previous authorities here and now. But I have no hesitation in saying that the view of the Court of Appeal was generally accepted, by the Equity Bar at all events, as being that which was best justified both by reason and by authority. However, the House of Lords reversed the decision.[1] Every lower Court in England, including the Court of Appeal, is of course bound to follow the House of Lords. It has, therefore, been the duty of the Court of Appeal to apply the doctrine

[1] *Derry* v. *Peek* (1889) 14 App. Ca. 337. Not one of the noble and learned persons who took part in this decision had practised at the Equity Bar, or had any substantial opportunity of becoming acquainted with those rules of equity to which, by the terms of the Judicature Act, the House of Lords and all other English Courts were bound to give the preference.

laid down by the House of Lords to all similar cases which have since come before it. The result is that English law, save in certain special cases, does not recognize any duty whatever of taking any pains to ensure the accuracy of statements which one makes to the intent that other persons shall act upon them; that, apart from duties incident to a contract, nothing short of a man's absolute want of belief in the truth of his own assertion will make him answerable for its falsehood; and that this is a fixed rule of law, which must take effect however gross the misrepresentation has been in fact, and however mischievous the results.[1]

Effect on special rules of equity.

It was supposed to be a settled rule of equity that a man cannot be heard to say that, when he made a statement which was contrary to fact, he had forgotten matter of fact which had once been within his knowledge, and which it was his business to know. This also is swept away by the decision of the House of Lords in *Derry* v. *Peek*. The cases on which the rule was founded are either overruled or explained away as being only special cases of estoppel.[2]

Law of contract and estoppel not affected.

We must remember that this doctrine applies in terms only to Fraud or Deceit as a substantive ground of action for damages. It does not in any direct manner affect the right of rescinding con-

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[1] *Le Lievre* v. *Gould*, '93, 1 Q. B. 491, C. A.

[2] *Low* v. *Bouverie*, '91, 3 Ch. 82.

tracts. There is no doubt that in many cases (as in the leading case itself) where the right of action for damages is excluded, a contract induced by the misrepresentation may be set aside if the proper steps are taken in due time. Neither does this rule affect the law of estoppel. This has been fully and accurately explained by my learned friend Mr. Caspersz in the Tagore Lectures of last year,[1] and it has been judicially declared that *Derry* v. *Peek* has nothing whatever to do with the doctrine of estoppel.[2]

But it may be worth while to point out that the principle of what we now call "estoppel in pais" is by no means recent. As long ago as 1814 Lord Eldon referred to it, though not by that name, as already well established.

"This [the law, then recent, of actions for deceit] has some authority in a class of old cases, referred to in *Neville* v. *Wilkinson*,[3] and a case at law, *Montefiori* v. *Montefiori*.[4] If a person was induced to advance his money by the representation of another, that he had no demand upon a particular individual, that consideration being clearly made out, and the person so advancing being

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[1] The law of Estoppel in British India: Calcutta and London, 1893, Ch. I.

[2] Lord Esher, M. R., *Tomkinson* v. *Balkis Consolidated Co.* '91, 2 Q. B. 614, 620.

[3] 1 Br. C C. 543.

[4] 1 Black. 363.

misled by that misrepresentation, a court of equity had long held, that the mouth of the person who made that misrepresentation was shut; that he should never utter a contradiction to what he had so asserted, thereby misleading others." [1]

Decision of H. L. whether the rule for British India.

We now have to examine whether the law laid down on this point by the House of Lords for England is the law of British India. There is no doubt, I conceive, that the Judicial Committee of the Privy Council is the only tribunal whose decisions are actually binding on the High Courts of this country. With the law of Bengal or of the North-West Provinces the House of Lords has no more to do, in its judicial capacity, than with the law of Ceylon or Mauritius. At the same time a permanent opposition between the House of Lords and the Judicial Committee on a point of substantially English law is a bare speculative possibility, for the personal composition of the two tribunals is becoming more and more the same, although their formal constitution remains as distinct as ever. The risk of permanent difference of views between the House of Lords and the Supreme Court of the United States, on this or other points of general importance in the Common Law, may well be a serious one for the English-speaking world: but I should not be

[1] *Ex parte Carr*, 3 V. & B. at p. 111; 13 R. R. at p. 160.

justified in dwelling on it here. We must take it, I think, that the law laid down in *Derry* v. *Peek* by the House of Lords will be followed by the Judicial Committee, whenever the occasion arises, for all British possessions where the law on the subject is formally or substantially English. There remains the question where there is anything in the Anglo-Indian Codes which has to be taken into account as modifying the common-law rule, or confirming one opinion rather than another. Now the law of civil wrongs, as we know, has never been codified in British India. The Contract Act contains definitions of Fraud and Misrepresentation on which we shall have to comment hereafter. These definitions are limited to the purposes of the Act and cannot directly affect the judicial treatment of Fraud considered as a substantive cause of action, and not merely as a ground for rescinding contracts. But it may safely be said that it would be difficult for any Court to take a more stringent view of what constituted fraud, for the purpose of actively recovering damages, than that which the Contract Act has formulated for the purpose of deciding what contracts are voidable. If, then, we look to the Contract Act (s. 18, sub-s. 1), I think we cannot escape the conclusion that its framers regarded an assertion made with belief in its truth, but without any reasonable grounds, as being not fraud but misrepresentation. So far as

I can offer any conjecture, it is that they would have agreed with the House of Lords and not with the Court of Appeal on the pure point of law which was decided in *Derry* v. *Peek*. What they might have thought the proper inference of fact as to the defendant's belief or other state of mind, in that or any similar case, it is of course impossible to say.

The point not yet judicially dealt with in India.

So far as I have been able to learn, the effect of *Derry* v. *Peek*,[1] whether on the rule of the common law, or on what was previously supposed to be the doctrine of equity, has not yet come under consideration in any Superior Court in British India. Neither does it appear that the judgment of the Court of Appeal reversed by the House of Lords had in the meantime been followed or discussed here. Practically, therefore, the law remains very much what practitioners in courts administering (to all practical interests) English case-law, had usually considered the common law (as distinguished from the doctrines of equity) to be. But it is to be hoped that no Court in British India or elsewhere will hold itself fettered by the decision in *Derry* v. *Peek* with regard to the inference of fact which it may think proper to draw from the facts proved or admitted in any particular case as to the intention or state of knowledge or ignorance of a person charged with deceit.

[1] 14 App. Ca. 337.

Even in England the decisions of the House of Lords are binding only to the extent of the matters of law that were actually decided, and of the reasons for the decision so far as they can be collected with certainty.

Decision of H. L. not incapable of qualification in British India: the rule in *Rylands* v. *Fletcher*.

It may be worth while to remember that we already have at least one example of a leading decision of the House of Lords being materially qualified in its application to British India. In *Rylands* v. *Fletcher*[1] the Court of Exchequer Chamber laid down a wide and stringent rule as to the duty of occupiers of land towards their neighbours. The decision was upheld by the House of Lords, and the reasons given for it were fully confirmed. Nothing could be more general or emphatic than the language of the judgment. "The person who for his own purposes brings on his lands, and collects and keep there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape." Accordingly the defendants in that case were held liable for damage done by the escape of water from an artificial reservoir they had made, although the escape was due to a state of things which they had no reason to know or suspect. But the High Court of Madras and the Judicial Committee of the Privy Council declined to extend this

[1] L. R. 1 Ex. at p. 278; L. R. 3 H. L. 330.

ruling to the overflow of an ancient tank which a zamíndár maintained by custom for the benefit of agriculture in the district. The Judicial Committee[1] did not dispute the correctness of *Rylands* v. *Fletcher*, but found, as the Court below had found, a substantial difference in the facts. Here the zamíndár was performing a public duty by maintaining the tank, and it would have been too hard if, performing it with due diligence, he had been held liable for the consequences of inevitable accident. Extraordinary rainfall had been the immediate cause of the overflow. The distinction is quite real and legitimate. Indeed, there have been some cases in England in which, for not dissimilar reasons, the strict rule was not applied. There is, however, something more than this. In every case of the kind which has been reported since *Rylands* v. *Fletcher*, that is, during the last 25 years, there has been a manifest inclination to discover something in the facts which took the case out of the rule. According to the English judicial system which has gone round the world with the English language and English or Anglicized institutions, the decisions of superior courts are not merely instructive and worthy of regard, but of binding authority in subsequent cases of the like sort. But there are some authorities which are

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[1] *Madras R. Co.* v. *Zamindár of Carvatenagaram*, L. R. 1 Ind. App. 364; S.C. 14 Ben. L. R. 209.

followed and developed in the spirit, which become the starting-point of new chapters of the law; there are others that are followed only in the letter, and become slowly but surely choked and crippled by exceptions. This, again, is independent of the considerations of local fitness which must always have weight when precedents are cited from a country remote both in place and in manners. It was lately held in England that an elephant is a dangerous animal, which the owner keeps at his peril.[1] We are in no way concerned to dispute the propriety of this decision in England, but surely it would be both absurd and disastrous to follow it in British India.

Future of *Derry* v. *Peek*.

Will *Derry* v. *Peek*, in British India, belong to the class of authorities which are willingly applied and developed, or to the class which the Courts endeavour to confine to the exact point decided, and to cases where the facts are closely similar? The ground appears to be still pretty clear in this country. Perhaps it is too much to hope that the Courts will be able to ignore the decision: but there does not appear any reason why they should be eager to extend it. My own opinion, and I believe the opinion of most English-speaking lawyers who have been trained in the doctrines of English equity, is that a grave misfortune happened to English law when the House of Lords

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[1] *Filburn* v. *Aquarium Co.* (1890) 25 Q. B. Div. 258.

reversed the judgment of the Court of Appeal in that case.[1] The decision tends to negative any duty whatever to take the most ordinary care in verifying statements intended for other people to act upon in matters of business. It can hardly be maintained that such a decision is likely to improve commercial morality. There may possibly be moralists or men of business, in England or in British India, who are sanguine enough to think there is no room for improvement. If any such there be, I have not heard of them. There may possibly be lawyers who do not think it any part of the office of Courts of Justice to be jealous in upholding the highest possible standard of good faith in dealings between man and man. Such was not the view nor the spirit of the judges who expanded the mercantile branches of the Common Law from rudiments into a system within the space of half a century.[2] However, the decision is there. It has already been found necessary in England to obviate its effects, as regards future cases arising on the prospectuses of companies and other invitations to subscribe for shares or debentures, by special legislation.[3] Its immediate ap-

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[1] For discussion (to repeat which would be out of place here) see L. Q. R. v. 410; vi. 72. My learned friend Sir W. Anson differs with me on the point of law, but thinks the case was wrongly decided on the facts.

[2] Commercial law was still rudimentary when Blackstone wrote.

[3] The Directors' Liability Act, 1890, 53 & 54 Vict. c. 64

plication to the precise class of facts on which the decision was given is abrogated, but outside those limits the rule that no want of care in making positive assertions can be equivalent, as matter of law, to bad faith is left to work whatever expected and unexpected mischief it may. We can only hope that in British India, if not in England, some way may be found of keeping the mischief within tolerable bounds. I do not know whether the Directors' Liability Act of 1890 has yet been imitated by the legislatures of any English colonies. Nothing of the kind appears to have been done in British India. Should any of the High Courts feel bound to follow *Derry* v. *Peek* on the facts as well as the law, the result might be that persons taking shares in companies would remain exposed in India to considerably greater risks than in England.

CHAPTER III.

SPECIAL VARIETIES OF FRAUD.

A.—INDIRECT FRAUD BETWEEN PARTIES.

Direct fraud by false assertion.

FRAUD is most easily conceived in the form of cheating effected by downright falsehood in word or deed; as for example, by the assumption of a character or authority which one has not, or by holding out the prospect of imaginary and fictitious advantages. There can be no doubt what name ought to be given to such conduct as offering a house for sale and describing it as in the occupation of a desirable tenant, when one knows that the tenant is habitually in arrear with his rent and persistently neglects the repairs he has taken upon himself; or procuring a situation for a defaulting clerk by recommending him to a new employer as an excellent young man.[1] If there is in fact any doubt as to applying the same name to precisely similar conduct when practised on a much larger scale by the promoters of companies, our conclusion must be, not that there is any real

[1] *Foster* v. *Charles* (1830) 6 Bing. 396; 7 Bing. 105.

difference in the nature of the facts, or in the rules of law to be applied to them, but that something is amiss with the standard of commercial morality. Deceit is no less deceit when it is practised on a number of unknown persons than when it is practised on a single known person. It is common learning that the offer of a contract may be addressed to all and any persons willing to accept it, as in the familiar cases of procuring information by advertisement of a reward. In the same manner, when a representation of alleged facts accompanies a general offer or an invitation to deal,[1] it is effectually addressed to all persons who may act on the communication as a whole, and it is capable in each individual case of giving rise to the same liability as if it had been exclusively addressed to the individual concerned in that case. For obvious reasons, however, cases of perfectly simple fraud, where the deceit is effected by a statement wholly and plainly contrary to facts capable of proof, are not common in Courts of civil jurisdiction. Not that such cases are in themselves rare; but these grosser forms of deceit will be found to come, oftener than not, within some head of the criminal law. This is especially the case in British India, where the definition of cheating (P.C. ss. 415, 446) covers in some respects,

[1] The distinction between the offer of a contract and a mere invitation of offers is of great importance in the law of contract. We have not to dwell on it now.

and very properly so, a wider field than the offence of obtaining by false pretences as known in the Common Law. There is no reason to suppose that the technical doctrine of a civil wrong being "merged in the felony," where the same act is an offence and a civil wrong, is applicable in this country, whatever vitality may be left in it at home after the series of unfavourable comments that have been made on it.[1] But in practice criminal proceedings will always be more effectual where they are possible, and under these conditions it is seldom indeed, as common experience shows, that a civil action would be of any advantage to the person wronged.

Indirect frauds: contracts made with intention of not performing.

There are other kinds of fraud and circumvention, however, than those which proceed by the method of positive lying. Many forms of concealment, many ways of suppressing or distorting material facts, can be practised without the utterance of categorical falsehood. Such devices are none the less fraud. The law, whether codified or uncodified, is not so tied down by letter-worship as to be unable to deal with them. A purchase of goods on credit, made with the intention of not paying the price, is as good an example as any.[2] We can

[1] I have discussed this in my book on the Law of Torts, 3rd ed. 184-6.

[2] The law is well settled that this is fraud. See *Clough* v. *L. & N. W. R. Co.* (1871) L. R. 7 Ex. 26; *Ex parte Whittaker* (1875) L. R. 10 Ch. 446, 449; and in America, *Donaldson* v. *Farwell* (1876) 93 U. S. 631.

hardly say that there is express misrepresentation in such a case. A promise to pay is not quite the same thing as a statement of present intention to pay. No doubt it includes a declaration of the promisor's intention. But the effect of that declaration relates to a future time, future however short the interval may be, namely the time when the promise is to be performed. And it creates duties and rights of a definite kind, namely the obligation of the contract, which in a normal case depend on the actual contents of the promise, to be collected by proper interpretation from its terms, and not on the state of mind of either party at the moment when the promise was made. Yet it is plain that a promise does in substance represent that the promisor has the intention of performing it. The right to enforce an explicit contract is the same, whatever the promisor's secret intention or mental reservation may have been; but no man would accept a promise if he knew that the promisor was making it with the intention of refusing or avoiding performance. That intention, when it exists, is not a breach of the promise; but it is none the less contrary to the good faith of the contract as a whole, on which the promisee is entitled to rely. It is true that an open refusal to perform a promise may be treated, at the promisee's election, as an immediate breach, although the time for performance has not arrived.[1]

[1] The latest example is *Synge* v. *Synge*, '94, 1 Q. B. 466.

This is one of the beneficent fictions which have been wisely introduced in the practice of our law. Such a refusal may well have nothing fraudulent about it, for it may proceed from an honest and morally excusable mistake on the promisor's part as to his rights under the contract; and it is convenient for both parties that in such a case the law should provide means of determining the question at once. To make a promise with the set purpose, at the time, of not performing it is a different matter both in morals and in law. Clearly it is a wilful misleading of the promisee, who assumes that the promise is made in order to be kept. Formerly it was supposed by English lawyers that a man's intention was not a matter of fact capable of proof. This was probably connected with the old rule of common-law procedure (not of equity) that parties to a cause could not be witnesses. But this view is no longer held, and appearances of authority to the contrary, even in modern times, need not be regarded.[1] On the contrary, "the state of a man's mind is as much a fact as the state of his digestion."[2] It may be harder to prove than other and more external facts, but, whenever it concerns us to show it, we may prove it if we can. In modern English criminal law it is even held that

[1] I regret to see such an obsolete stumbling-block as *Hemingway* v. *Hamilton*, 4 M. & W. 115, still prominent in editions of the Contract Act.

[2] Bowen, L. J., *Edgington* v. *Fitzmaurice* (1885) 29 Ch. Div. App. 483.

the wrongful intention with which a person obtains property may wholly nullify that effect of a transaction which is both apparent and intended by the other party. This is the doctrine of "larceny by a trick."[1] We do not, of course, mean to say that intention is always a material fact, which is another and distinct question. Thus the construction of a contract does not depend either on what the promisor actually intended his promise to mean, or on what the promisee actually understood, but on the meaning which the promise, as the promisor expressed it, was reasonably fitted to convey to the person to whom it was made.

Falsehood by suppression of truth.

The concealment or suppression of material facts may be as much a falsehood and fraud as a direct lie. The test is whether that which is expressed is rendered so misleading by the omission or suppression as to be in effect false as a whole.[2] No difficulty whatever is presented by this. It would be absurd if the law were otherwise. We have only to remember that there exist, independent of this rule, positive duties to disclose particular kinds of facts in particular kinds of transactions. These duties vary in their stringency according to the nature of the subject-matter. Contracts of insurance and contracts for the sale of land furnish the

[1] It would be useless to refer here to the decisions, which are numerous and subtle. Criminal lawyers know well enough where to find them.

[2] Lord Cairns, in *Peek* v. *Gurney* (1873) L. R. 6 H. L. 400.

most important examples. We shall recur to this under the head of Misrepresentation.

B.—Fiduciary Relations.

Different considerations arise when we come to the kind of fraud which is said to be presumed from the circumstances and condition of the parties. It is really a compound, in varying proportions, of fraud and moral coercion. With direct and positive coercion as a cause of avoiding contracts we are not concerned. Moreover it is of extremely rare occurrence in modern times. It occurs only too frequently in judicial experience that "a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other which, but for such confidence or authority, he could not have obtained."[1] In such cases it is seldom, if ever, possible to prove specific acts of deception, or of exercise of authority amounting to moral coercion. Yet the risk of abuse is obviously great. The law therefore reverses its usual rule of evidence in dealings between man and man. Commonly we do not presume, without specific indications, that there is anything

Abuse of authority and confidence (undue influence).

[1] Contract Act, s. 16.

contrary to good faith in transactions which on the face of them are regular. Indeed, as unfounded charges of fraud are a not uncommon resource of parties who have made a bad bargain and would like to be rid of it, so the tradition of judicial prudence has always been to require rather strict proof where such charges are made, and, when they do turn out to be unfounded, to show no lenity in the matter of costs. But this is the rule as between equals, persons who are capable of dealing with one another, as the accustomed forensic phrase goes, "at arm's length." When one party habitually looks up to the other and is guided by him, he can no longer be supposed capable, without special precautions, of exercising that independent judgment which is requisite for his consent to be free. Now the Contract Act says, embodying the rule of English law and of all civilized jurisprudence, that agreements are enforceable not merely because and whenever they are made, but (among other conditions) "if they are made by the free consent of parties competent to contract."[1]

Burden of proof thrown on donee in position of authority. Rule codified in Evidence Act for British India.

Therefore it is not enough for the law to say that gifts and beneficial agreements obtained by the abuse of authority or confidence, by Undue Influence as it is technically termed, are voidable. It also throws the burden of proof on the party

[1] Contract Act, s. 10.

taking the benefit. Instead of requiring the party seeking restitution to prove that the transaction was unrighteous, and his consent not free, it requires the party resisting it to show that the consent was really free, and that all due precautions were used to secure independence of judgment. "Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence." These are the words of the Indian Evidence Act (s. 111).[1] So far as they go, they give effect to the general law of all courts in which the principles of English Equity prevail. But I venture to think that they do not go quite far enough to be an adequate expression of the law, unless the words "active confidence" are to receive a larger meaning than they would naturally convey to any reader, whether a layman or a lawyer, not familiar with this class of cases. Moreover, I venture to think that, although the rule here laid down is strictly a rule of evidence, it is in effect the most important part of the law on this subject, and that it would have been more useful if it had been inserted in the Contract Act. The Anglo-Indian Codes are intended to be used, on occasion, by magistrates who are not conversant with the details of English law, and it would be quite possible for a judicial officer dealing with

[1] *See* Appendix, p. 135.

s. 16 of the Contract Act to overlook both s. 111 of the Evidence Act and the rule of equity jurisprudence on which it was founded. Nay more, I have before me as I write a commentary on the Contract Act purporting to be specially intended for the use of practitioners in the mofussil. Under s. 16 there is no reference whatever to the Evidence Act. Neither do I find any such reference in the only other annotated edition of the Contract Act with which I am acquainted. In fact, the only good working collection of Indian cases on undue influence I have met with is not in either of these works, but in Mr. Field's edition of the Evidence Act. This shows the danger of being over-logical in the arrangement of codes intended for common use. It is true that no great harm would be done if the judge, while ignoring the Evidence Act, were to rely on the equivalent English authorities or on some tolerably accurate statement of their effect. But there is no security that he would have the means of doing even this. Whenever the Contract Act is amended, I would submit that this section, with some little enlargement of its language, ought to be transferred to it. And it may be worth considering whether it should not be repeated in the Transfer of Property Act. A reference to the Evidence Act, introduced by way of explanation, might possibly suffice. But some kind of authentic reference to so material a variation of the common rules of proof should certainly

be made in immediate connexion with the parts of the substantive law which it affects. I do not feel sure that the existence and importance of the rule have always been fully realized even in the High Courts; and certainly no equity lawyer can feel otherwise than sure that the law would be powerless without it except in the most flagrant cases. On the other hand it is possible to exaggerate the scope of the rule. It is sometimes said that the mere fact of a large voluntary gift being made throws on the receiver the burden of proving that the donor was a person of general capacity to dispose of his or her property. There are some few dicta which seem to go that length, but it is not the accepted doctrine in England. In fact I have heard it laughed out of court (not in a reported case) by Sir G. Jessel.

Examples of doctrine in Indian cases.

It would hardly serve any useful purpose to give here a detailed account of the doctrine of Undue Influence as applied in English courts of equity. The matter can easily be found in modern text-books on the law of contracts, or on the law of fraud and allied subjects, besides the somewhat old-fashioned exposition in works on "Equity Jurisprudence;" and a careful perusal of a few of the recent decisions will be found more profitable than reading about a greater number of decisions in any text-book.[1] Indian law reports afford, so

[1] *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, may now be considered the leading case *Morley* v. *Loughman*, '93, 1 Ch. 736, is the latest reported decision of any importance.

far as I have been able to ascertain, fewer illustrations than might have been expected. One pretty strong case came before the High Court of the North-West Provinces a few years ago.[1] Both parties were Brahmans, the plaintiff a poor and the defendant a rich one. The plaintiff had a claim to certain property of considerable amount. The defendant took the plaintiff to live with him, and thus he was enabled to prosecute his claim, which was in time successful. While the proceedings were pending, the plaintiff executed a sale of half the property in question to the defendant's brother. The price was not adequate, and moreover the plaintiff alleged that no money really passed at all, and the Court believed him. Some months later the plaintiff made a gift of the remaining half to a temple built by the defendant's ancestors, and of which the defendant had charge. The plaintiff sued to set aside the gift, explaining that he intended to bring a separate suit with regard to the sale. It was found as matter of fact that this gift left the plaintiff without any means, that the defendant had motives of personal gain in procuring it, and that the defendant prevented the plaintiff from having access to independent advice. The defendant did not appear as a witness to contradict the plaintiff's version of the facts; and, so far as can be made out from the report, he did not offer any explicit contradiction

[1] *Sital Prasad* v. *Parbhu Lal* (1888) I. L. R. 10 All. 585.

at all. Besides all this, the plaintiff appeared to the Subordinate Judge to be a man of weak intellect. It was plainly impossible that a transaction so conceived and carried out should be upheld in a Court administering any sort of equity. The only extraordinary thing about the case is that, for some reason not fully explained, it appeared to the Court to be one of difficulty. Short of ascribing to the Court a singular lack of elementary acquaintance with the rules of equity, which we have no right or reason to do, we can only suppose that there must have been points of doubt on the evidence which are not mentioned in the report. This is the more possible because, according to a common and most reprehensible habit of current Indian reporting, the report seems to have been made up from the pleadings and judgments without any independent attention either to the arguments or to the evidence. As it is reported, however, a plainer case of undue influence cannot be imagined.

Gifts between lawyer and client, etc.

Transactions between legal advisers and their clients, by which the lawyer obtains a benefit from the client, have always been looked on with special jealousy by the English Courts. Indeed, there is some authority for saying that a solicitor is positively incompetent to accept a gift from his client while that relation continues, even if there is no question of undue influence. At all events, the burden of proof is on the lawyer that he gave

or procured the fullest information and advice for the client, as much as if he had been advising him (or her) against a third person. Not only absence of deception or moral pressure, but the fullest and most active openness is required. The same rule applies to other relations of confidential authority or advice, as, for example, those between parent and child, guardian and ward, a medical man and his patient, a religious preceptor or director and his disciple.[1] It may be said that if this doctrine had been consistently applied in all civilized countries, many gifts to pious uses both in the East and in the West would scarcely have escaped being cancelled or grievously cut short. This is mere speculation, and that might perhaps be a sufficient answer; but if we are to speculate, we are free to doubt whether the world would really have lost much by it. Certainly the tradition of secular jurisprudence, even in the Catholic countries of Europe, has always been to look with a jealous eye on gifts to charitable uses, however pious in themselves, which have the effect of disinheriting the donor's own kindred.

Indian examples.

Accordingly the High Court of this Presidency has been well within the principles and authorities of English equity when it has set aside a beneficial contract obtained by a legal adviser from his own client,[2] and relieved a *pardahnashín* lady from

[1] *Cf.* Contract Act, s. 17, ill. (*b*).

[2] *Pushony* v. *Munia Halwari* (1863) 1 B. L. R. 95, A. C.

exorbitant terms on which a loan had been advanced to her by her *mukhtear*.[1] On the latter occasion the decision was affirmed by the Judicial Committee. Parties in an independent position are masters of the terms they choose to make; but when the terms made between parties in confidential relations are such as, judged by the reasonable and ordinary practice in affairs of the same kind, appear unconscionable, it is an almost necessary inference that the confidence of the client has been abused, and undue influence exerted.

Undue influence not easily presumed where no relation of confidence.

On the other hand the Courts will not easily give credit to mere surmises and suggestions of undue influence where there is no relation between the parties naturally producing general authority on one side and general deference on the other, and where it is not proved that their habitual conduct was of this kind. There has been in India one special application of this rule to local usages, an obviously reasonable one. A *pardahnashín* woman is carefully guarded by the Courts here against marital influence;[2] it has even been laid down in the Judicial Committee that "In the case of deeds and powers executed by pardanishin ladies, it is requisite that those who rely upon them should

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[1] *Srimati Kamini, &c.* v. *Kali* (1885) I. L. R. 12 Cal. 225; S.C. L. R. 12 Ind. App. 215.

[2] *Sudisht Lal* v. *Mussamut Sheobarat Koer* (1881) L. R. 8 I. A. 39; I. L. R. 7 Cal. 245, 250.

satisfy the Court that they have been explained to and understood by those who execute them." However the case was not decided on that ground. And in transactions between a *pardahnashín* woman and her husband the burden of proof is on the husband to show that her consent was intelligent and free.[1] Still more is this the case when the lady is illiterate and the deed of gift is in a language she does not understand.[2] But this does not amount to saying that every *pardahnashín* woman must be presumed to be, as a matter of course, under some one's dominion. It is common knowledge that many such women are perfectly capable of exercising an independent judgment in their own affairs. Therefore, where a *pardahnashín* woman had executed a gift which in the circumstances appeared to be in no way improvident, but rather a natural and reasonable act of bounty, and it appeared to have proceeded from her own spontaneous wish at the time, a suggestion of undue influence made afterwards by her representatives met with no encouragement.[3] This

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[1] *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1867) 11 Moo. Ind. App. 551.

[2] *Ashgar Ali* v. *Delroos Banoo Begum* (1877) I. L. R. 3 Cal. 324, in P.C. To same effect *Wajid Khan* v. *Raja Ewaz Ali Khan* (1891) L. R. 18 Ind. App. 144, where the person benefited was the lady's confidential agent.

[3] *Mahomed Buksh Khan* v. *Hosseini Bibi* (1888) L. R. 15 Ind. App. 81; S.C. I. L. R. 15 Cal. 684. The lady had caused the deed to be signed for her, but had written on it herself in Hindí the words *likhá se janoge* (लिखा से जनोगे), "which are said to mean, From what is written you will know" (L. R. 15 Ind. App. at p. 84). It is

attempt was made yet more hopeless by the circumstance that the lady had in her lifetime said nothing about undue influence, but maintained that the deed of gift was a forgery. The device of falling back on vague charges of undue influence, or what used to be called "surprise," when more positive charges of fraud or forgery break down, is by no means a new one. We have an example just two centuries old in the early reports of the Court of Chancery.[1]

Contract Act on inadequate consideration.

There has been some uncertainty in the language of the English authorities as to the importance and effect of the consideration of a contract being inadequate, especially with regard to the remedy of specific performance. It is needless to discuss the matter here, as the Contract Act (s. 25, expl. 2) has settled the point for British India according to the opinion now generally received in England, namely, that inadequacy of consideration may be evidence, but is not more than evidence, that the

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curious that the Judicial Committee, although three of the four members present had served in India, and must have known at a glance that the words could mean nothing else, declined to assume any judicial knowledge whatever. The English printers of the Law Reports, having peradventure never heard of Hindí, have invented an imaginary *Hindu* language in this passage. Contrast the judgments in *Gokal Prasad* v. *Radho*, a case of the same year in the N.W.P. I. L. R. 10 All. 358, where the defamatory words spoken in Urdu are set out in the original and not formally translated in any part of the report. If that case had gone home on appeal would the Judicial Committee have required evidence of the meaning?

[1] *Earl of Bath and Montague's* Case (1693) 3 Ch. Ca. 55.

consent of the party who accepted such a consideration was not really free. The Specific Relief Act, following out this doctrine, says that specific performance is not to be enforced against a party who has agreed for a consideration "so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff."[1] There is no doubt that undue influence includes the abuse not only of influence derived from a standing position of authority, but of that which is derived from a temporary relation of control and dependence produced by the distress or mental weakness of one party. If this is the meaning of the words "undue advantage," the language of the Specific Relief Act is in accordance with the general law. We can hardly suppose that the framers of the Act intended to disregard the current of modern English authorities and go back to the dangerous vagueness of old-fashioned text-writers on equity. The use of the word "surprise," now seldom if ever heard in an English court, in two places of the Act,[2] may be taken as no more than a piece of abundant caution. In an Indian case where the facts took place many years before any of the Acts now in question were passed, an attempt to set aside a sale after the lapse of seventeen years, on

[1] S. 28.

[2] S. 26 (*b*) and s. 28 (*c*)

suggestions of undervalue and misrepresentation, wholly and justly failed.[1]

Unconscionable bargains with "expectant heirs" and poor and ignorant persons.

There is a class of cases in which English Courts of Equity have protected persons deemed not to be in an independent position against oppressive and extortionate bargains. Such persons are those who are generically called "expectant heirs"; but the jurisdiction extends to poor and ignorant persons at large when they deal with persons in a better position as to means and knowledge, and especially when the dealing is with any reversionary interest.[2] Dealings of this kind may be thought to come nearer to Coercion than to Fraud. The ground on which relief is given is not so much deceit as the unconscientious use of power arising from the situation of the parties.[3] It is hardly possible to speak of fraud in the ordinary sense when it is a simple matter of arithmetic to expose the true nature of the terms demanded. Still, when terms which are exorbitant even for a speculative risk are imposed on persons who, besides being in want of money, are inexperienced or illiterate, or both, the lender has the burden thrown upon him of satisfying the Court that the borrower really understood the terms and was content to take them as the best he could get. Not that

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[1] *Mir Azimudin Khan* v. *Zia-ul-Nisa* (1882) I. L. R. 6 Bom. 309.

[2] The latest case is *Fry* v. *Lane* (1888) 40 Ch. D. 312, where authorities are collected.

[3] L. R. 8 Ch. App. 491.

people may not make the most disadvantageous bargains if they choose to do it with their eyes open. But where we find on the losing side of the bargain ignorance, distress, or even fear of oppression and ruin, and on the gaining side the commanding position given by experience and resources, the general presumption that the parties are on an equal footing of intelligence and freedom for the purpose of the contract is properly displaced. "The circumstances of poverty and ignorance of the vendor"—or borrower—"and absence of independent advice throw upon the purchaser,"—or lender—"where the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was fair, just, and reasonable."[1] The circumstances of Indian society have developed a rather new type of cases of this kind, in which the English principles have been freely applied by the High Courts, with the approval on more than one occasion of the Judicial Committee. These cases are clearly not within s. 111 of the Evidence Act. There can be no talk of confidence between a grasping lender and a needy borrower, unless the case is complicated by abuse of a pre-existing relation of authority or intimacy, which does not often happen. And they hardly come within the second clause of s. 16 of the Contract Act. It would be forcing language to say that an illiterate suitor who wants money

[1] Kay J., *Fry* v. *Lane*, 40 Ch. D. at p. 322.

to prosecute a claim is "a person whose mind is enfeebled by old age, illness, or mental or bodily distress"; neither are the following words of the clause at all appropriate to money-lending cases. Again, the Specific Relief Act is evidently inapplicable to suits for the enforcement of mere money demands. The jurisdiction exercised by the Indian High Courts in setting aside agreements for unconscionable loans, and giving the lender only his principal and reasonable interest, must therefore be taken to rest on principles of English equity which, though not perfectly apprehended, or at any rate not perfectly expressed, by the framers of the Contract Act and the Evidence Act, retain their independent force. As this line of decisions is not adequately referred to, or indeed referred to at all, in such commentaries on the Acts as I have seen, it may be useful to add a short statement of the more material reported cases.

Indian cases.

In *Kedárí bin Ránu* v. *Átmárámbhat bin Náráyanbhat* (1866) 3 Bom. H. C. 11 (A. C.), a mortgage made by illiterate peasants and including, among other unusual provisions, a covenant to sell the property to the mortgagees at a gross undervalue in certain events, was set aside as fraudulent and oppressive.

In *Chedambara Chetty* v. *Raja Krishna Muthu Vira Puchanja Naiker* (1874) 13 B. L. R. 509, in P. C., a bond was set aside which had been obtained from a young zamíndár who had just come of age, and had no independent advice, by threats of persistent and vexatious litigation. The case is of some importance in another way, as showing to what extent the rule of public policy against champerty will be applied in British India.

In *Mothoormohun Roy* v. *Soorendro Narain Deb* (1875) I. L.

R. 1 Cal. 108, the interest on a bond given by a boy of sixteen (who was a Hindu, and of full age by his own law) was cut down as unconscionable, and only 6 per cent. allowed. But the defendant was ordered to pay the costs of the suit, having set up an unfounded defence of minority.

In *Prem Narain Singh* v. *Parasram Singh* (1877), L. R. 4 Ind. App. 101, three co-heirs, of whom two were under age, gave up half their property, by what purported to be a compromise arranged by a *panchâyat*, to persons who had no title whatever, and had taken possession with a large body of retainers. They had no professional advice, and apparently were not acquainted with their rights. The Judicial Committee held, agreeing with the High Court of Bengal, that there was no consideration for their act, and they were not really free agents; and the *ikrarnamah* was set aside.

In *Lalli* v. *Ram Prasad* (1886) I. L. R. 9 All. 74, a case between an illiterate peasant proprietor and (it seems) a professional money-lender, the Court disallowed a peculiar and extortionate form of stipulation for a yearly fine called *dharta*, in addition to compound interest, which was itself to be added to the interest-bearing sum. A similar case (where the mortgagee had wilfully refrained from realizing his security, in order to run up the compound interest) is *Madho Singh* v. *Kashi Ram* (1887) 9 All. 229.

In *Chunni Kuar* v. *Rup Singh* (1888), I. L. R. 11 All. 57, a claimant of property, having no means, obtained an advance of Rs. 3,700 by giving a bond for Rs. 25,000 to be paid within a year after receiving possession of the property. He succeeded in his suit, and the lender claimed the amount secured by the bond. The Court held that the bargain was unconscionable, and it would be against public policy to enforce it, and allowed only the sum actually advanced with simple interest at 20 per cent., that being an usual rate in the N. W. P. for advances on doubtful security.

This case, in a further stage, was taken to the Privy Council: *Rajah Mokham Singh* v. *Rajah Rup Singh* (1893) L. R. 20 Ind. App. 127, affirming S.C. *nom. Loke Indar Singh* v. *Rup Singh*, I. L. R. 11 All. 118. Here the Judicial Committee

seems to have thought that the High Court was, if anything, abundantly cautious not to go too far in interfering with the agreements of parties.

Another case of the same class, where exorbitant terms are mixed up with what English law calls champerty, is *Husain Bakhsh* v. *Rahmat Husain*, I. L. R. 11 All. 128.

The two cases of *Mackintosh* v. *Hunt* (1877) I. L. R. 2 Cal. 202, and *Mackintosh* v. *Wingrove* (1878) I. L. R. 4 Cal. 137, show where the line is drawn. In the earlier case the promissory note sued on did not truly state the consideration, which was inadequate; the rate of interest was exorbitant, and the Court was not satisfied that the defendant understood the nature of the transaction. The lender was allowed only his principal with interest at 12 per cent. per annum. In the latter case the terms were of the same kind, but it was found as a fact that the defendant fully understood them. Here the Court declined to give relief. "If people with their eyes open choose wilfully and knowingly to enter into unconscionable bargains, the law has no right to protect them."

In *Buchi Rámáyya* v. *Jagapathi* (1884) I. L. R. 8 Mad. 304, a release executed by a Hindu widow shortly after her husband's death was upheld as having been deliberate and not inequitable; but the jurisdiction to inquire whether undue advantage had been taken, quite apart from coercion, was distinctly affirmed (see at p. 316).

Quite lately the Judicial Committee has re-affirmed the principle of this line of cases. Although the English law of champerty is not in force in India, agreements to share property under litigation, if recovered, in consideration of finding funds to prosecute the claim, "should be jealously scanned"; and they will not be enforced if their terms are unconscionable.[1]

Special rules as to agents and trustees.

Certain special and stringent rules as to the duties of an agent towards his principal, and a trustee towards the beneficiaries, are not uncon-

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Kunwar Ram Lal v. *Nil Kanth* (1893) L. R. 20 Ind. App. 112.

nected with the general policy of the law that underlies the doctrine of Undue Influence. But it is better for practical purposes to regard them as distinct positive rules incident to the contract of agency and to the office of trustee respectively.[1]

C.—Dealings Fraudulent Against Third Persons.

Voluntary and fraudulent conveyances.

There is a kind of fraudulent dealing which lies outside the ordinary law both of contracts and of actionable wrongs; the fraud not consisting in any deceit practised by one party upon the other, but in a common contrivance of both to circumvent a third person or class of persons, such as creditors, for the benefit of one or both of them. Such dealings are summed up in the current language of English-speaking lawyers under the head of Fraudulent Conveyances. A considerable amount of authority is to be found on the subject in our law-books, which it would be useless as well as tedious to recapitulate here. The cases purport, in a general way, to be founded on the statutes of Elizabeth against fraudulent and voluntary conveyances (13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5; 27 Eliz. c. 4).[2] But those statutes are said to be in affirmance of the common law,

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[1] See the Contract Act, ss. 215, 216; *Salford* v. *Lever*, '91, 1 Q. B. 168; Trusts Act, ss. 52, 53, 54, 88, 89.

[2] See now 56 & 57 Vict. c. 21, which in England and Ireland saves voluntary conveyances, "if in fact made *bona fide* and without any fraudulent intent," from being invalidated by 27 Eliz. c. 4.

that is, to be the expression of principles which were already recognized; just as in this country much the greater part of the Contract Act, the Trusts Act, and the Negotiable Instruments Act only defines in authentic terms the English law which (under one form or another, as explained in Ch. I.) had for many years been received and applied both in the Presidency towns and in the mofussil. This is material when we have to determine how far the statutes, in letter or in spirit, may be applicable here.

Statutes of Elizabeth and Transfer of Property Act.

So far as the statutes of Elizabeth were in force as part of the English statute law received in the original jurisdiction of the High Courts, they are repealed by the Transfer of Property Act (IV. of 1882), which now extends to the whole of British India proper except the Panjáb,[1] and superseded by s. 53 of the Act, which runs as follows :—

> Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.
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> Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration,

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[1] The Act has been extended to the Bombay Presidency, Bombay Govt. Gaz. 1892, pt. i., p. 1071, and to Rangoon, Burma Gaz. 1892, pt. i., p. 373.

the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

Principles of Statutes of Elizabeth received as common law in British India.

This does not make the law practically different in different parts of British India according as the Transfer of Property Act is in force or not. For it has been held by the High Court of Calcutta, and it would no doubt be held everywhere, that, apart from positive enactment, the principles declared by the statutes of Elizabeth are binding in British India as principles of equity and good conscience. Indeed this opinion may be said to have the authority of the Judicial Committee.[1] S. 84 of the Trusts Act (II. of 1882) should be attended to by Indian practitioners in this connexion. It is of wider scope than s 53 of the Transfer of Property Act, and it does not seem needful to comment here on the general learning of contracts and conveyances made for unlawful purposes.[2] As regards territorial extent, the Trusts Act and the Transfer of Property Act are far from coinciding, but as regards those parts of them which codify received law this probably does not lead to any practical inconvenience or difficulty.

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[1] *Abul Hye* v. *Mir Mohammed Mozaffar Hossein*, in P. C., I. L.R. 10 Cal. 616, 625; S.C. L. R. 11 Ind. App. 10; *Pogose* v. *Delhi and London Banking Co.*, I. L. R. 10 Cal. 951, where an antenuptial settlement was held to be, in the circumstances, fraudulent and void against the husband's creditors.

[2] See *Kearley* v. *Thomson* (1890) 24 Q. B. Div. 742.

Benami conveyances.

The wide-spead practice of Benami sales has, in this country, been specially fruitful in problems relating to the application of the English doctrine of fraudulent conveyances. Not that the doctrine is itself specially English, whatever this or that technical expression may be. No civilized system of property law can do without some means of protecting creditors and purchasers in good faith from collusive dealings intended by the parties to them to secure the enjoyments and advantages of ownership without the responsibility. For the general nature of what is known here as benami it will suffice to recall the words of my learned predecessor, Mr. Caspersz: "A Benami transaction has been described shortly as one in which the real owner of property allows it to appear in the name of an ostensible owner under a sort of secret trust." Let me remark in passing that this description could be applied with substantial accuracy to the practice of conveying land to feoffees to uses, as it prevailed in England for two centuries or more. Practices of this kind naturally grow up in a state of society where there is an appreciable risk, from one generation to another, of hostile conquest or confiscation. It would be surprising if they did not, and, having regard to the political state of India both before and after the short-lived prosperity of the Mogul Empire, I do not see the necessity of explaining the frequency of these transactions by some sup-

posed innate love of secrecy in the minds of Oriental owners of property. Neither is there anything surprising in the persistence of habits of this kind after the reason for them has disappeared. Our modern life is full of these survivals in things both great and small. Again, it is quite natural for ingenious persons to discover that the means of concealment which formerly were a shelter from the strong hand of princes and adventurers can be turned in peaceful times to the less ambitious but not less lucrative end of baffling creditors. With regard to the morality of such proceedings, all honest men both in the East and in the West are agreed. No honest European who knows anything of business will pretend that the practice of them is unknown in Western countries. Conveyances to uses after the old fashion are no longer possible in England, but collusive or "friendly" bills of sale over stock in trade and other moveable property are far from uncommon; and I am much mistaken if something very like *benami* does not go on among professional land agents, to whom land is merely a commodity of speculative purchase and sale, and whose floating liabilities often exceed their available resources.

Recognition of true owner.

The law might conceivably have refused to recognize any one but the ostensible owner for any purpose whatever, and have told the beneficial owner that it was merely his own folly to put his confidence in a *benámídár* who turned out faith-

less. Indeed this was exactly what the common law did in England. But the example is not encouraging. In England the results were, first that the Court of Chancery found an opening to increase its jurisdiction and business by which it was not slow to profit, and then that a grand stroke of legislative reform, the Statute of Uses, failed to attain almost every one of its objects, and only left the law far more complicated than it was before. General usage and convenience (or what is generally supposed convenient) are exceedingly hard things for the law to set itself against. In British India, therefore, it is settled, and, as I doubt not, wisely settled, that the benámídár is bound in law to give effect to the rights of the true owner as between themselves. When this is once an understood thing, the legal principles to be applied are not hard to ascertain.

Estoppel of owner against purchasers from benámídár.

The transaction may be, to modern and Western ways of thinking, of no particular use, but there is nothing wrong in it so far. When it is set up, however, to defeat the claims of the beneficial owner's creditors, or of a purchaser who has dealt in good faith with the benámídár, supposing him to be the true owner, then such persons deserve and receive the protection of the law, not only as against the owner himself, who has enabled the benámídár to appear and act as owner, but as against persons representing him by a gratuitous title, his heir for example. Thus the heir of a

beneficial owner has rightly not been allowed to set up his title against a purchaser for value (by right of pre-emption under Mahometan law) from the benámídár; that purchaser not having had, in the opinion of the Court, any notice that the benámídár had not power to dispose of the property.[1] This rule, it is material to remember, has nothing to do with the actual intention or state of knowledge of the true owner. Whether he had any fraudulent intention or not, it is enough that he by his voluntary act put the benámídár in a position to hold himself out as owner and obtain value for his apparent rights by way of purchase or advance. The law of Fraud is in truth inadequate on this ground; the purchaser for value is entitled to rely on the wider principle of Estoppel, in which the intention or other state of mind of the party estopped is not material.[2]

Where there has been fraud on creditors, etc.

Again, the beneficial owner is not allowed to undo his own act, even as between himself and the benámídár, where a fraudulent purpose has actually been effected by the transaction. A benami conveyance was made in order to avoid execution under a decree then outstanding, and

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[1] *Chunder Coomar* v. *Harbuns Sahai* (1888) I. L. R. 16 Cal. 137. The earlier case (1873) of *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh*, 19 [Suth.] W. R. 292, in P. C., is on the same lines.

[2] *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892) I. L. R. 16 Cal. 148, L. R. 19 Ind. App. 203, overruling cases to the contrary in N.W.P. and Madras. See Casperszz, Tagore Lectures, 1893, pp. 52 sqq.

the owner allowed a decree to pass in a new suit in the benámídár's favour. It was held that the owner was conclusively bound even as against the benámídár.[1] This appears to be a just decision for the discouragement of fraudulent practices, and quite consistent with the leading authorities both in British India and in England. But this is quite different from saying that the beneficial owner is precluded at all times and against all persons from showing the real nature of the transaction, as some Anglo-Indian judges would seem on some occasions to have gone near to thinking. It is not necessarily wrong for the real owner to support the apparent legal title of the benámídár against the claim of a mere stranger, though he would probably be estopped against all parties to that suit and their successors in title; and his doing so will not assist a person afterwards claiming through the benámídár who was not a party to that suit and is not a purchaser for value.[2] Still less is the true owner prevented, by the mere fact of having made a fictitious sale or taken a conveyance in another person's name, from showing what his real interest was; at all events where the transaction has not in the meantime had the effect of defrauding any creditor or other

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[1] *Chenvirappá* v. *Puttáppá* (1887) I. L. R. 11 Bom. 708; see p. 710 as to the facts.

[2] *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*, 21 [Suth.] W. R. 422, followed in several later cases without discussion.

innocent person. It would seem the better opinion that it does not matter with what intention the more or less fictitious conveyance was made, provided that the fraudulent or illegal object, if any such there was, has not been carried into execution to any material extent.[1]

As to evidence of notice, etc.

The question remains whether, having regard to the wide diffusion of benami holding of property in this country, notice of the apparent owner being only a benámídár may or may not, consistently with justice and the due protection of purchasers, be more easily inferred as a fact in Indian Courts than notice of a trust in English-speaking countries where the Common Law prevails. I refrain from expressing any opinion as to this, not possessing that experience of Indian affairs and society which alone could give such an opinion an appreciable value. There is authority, however, to show that the Court will not presume from circumstances of mere suspicion that a purchase was *benami*.[2]

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[1] *Ram Surun Singh* v. *Mussamut Pran Peary*, 13 Moo. Ind. App. 551; for the limit of the rule, *cp. Kearley* v. *Thomson* (1890) 24 Q. B. Div. 742.

[2] *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (1866) 11 Moo. Ind. App. 28.

CHAPTER IV.

MISREPRESENTATION.

Innocent misrepresentation.

WE now have to turn to the effects of Misrepresentation apart from Fraud. The supposition will still be that a materially incorrect statement is made in such a way that the person to whom it is made is entitled to rely on it; that he does act in reliance on it; and that he is thereby involved in a disadvantageous contract with his informant or his informant's principal, or otherwise suffers damage: but we shall also suppose that the statement was at the time believed to be true by the person making it. Evidently this gives rise to much more troublesome questions of principle than any that can be raised on the case of wilful or reckless falsehood. A man who has told the truth as, according to his lights, he thought it to be, cannot be visited with the same liabilities as a man who has gone about to deceive his neighbour. One may doubt, indeed, whether in the world of facts as they really are the case is of the commonest. It is possible to make a quite honest mistake in

one's own favour once in a way, but a series of such accidents leads an impartial bystander to doubt of the honesty. But in the world of legal justice the proof of fraud, except in highly flagrant cases, or where the facts amount to an ordinary criminal offence, is difficult and invidious, and it is generally better to dispense with undertaking to prove it if there is any other likely way of attaining the desired redress. Hence it is more important than would appear at first sight to know when and how far innocent misrepresentation (to use a compendious term which will now be easily understood) can be a ground of liability.

Not an offence or actionable wrong at all events.

We may see at once, to begin with, that on some points there can be no analogy to cases of fraud. No civilized law could make the innocent misrepresentation of facts an offence in itself, nor even a ground of civil action for damages. We are not yet speaking of rules applicable only to special classes of transactions; and, if there were any such universal rule as supposed, it would amount to setting up a general duty to give correct information to all the world. Such a duty could not be fulfilled by any human being; and the commerce of life would be impossible if every man spoke at his peril. There is not any universal duty to give information at all. By so short a course of reflection we are led to conclude that, if and whenever innocent misrepresentation is a breach of duty, it must be a breach of some special

duty to give correct information, or to answer for the correctness of what information one does give. Hence we cannot speak of the law of Misrepresentation in the same sense in which we speak of the law of Fraud. There is not any such substantive branch of law. What we do find is that in various branches of the law there exist particular duties of giving full and correct information, or of answering for the correctness of one's information even when it was given in good faith. So far as there is a law of Misrepresentation, it consists of the sum of these special duties and their consequences; so far as it has any real unity or connexion, that quality must be derived from the fact that duties of this kind are, almost if not wholly without exception, created by or annexed to contracts, and the breach of them does not create substantive liability, but can only entitle the party who has been misled to rescind the transaction and be restored to his former position. It is true that many public officers are bound to furnish or give access to particular kinds of information, registers and the like, on being duly required so to do; but I am not aware that their duty extends in any case beyond faithful dealing with the materials actually in their hands. If an action did lie, say for special damage caused by reliance on a miscopied extract furnished from a public office, the cause of action would be simply negligence in the performance of a public duty;

not that the registrar or clerk had made a false assertion, but that he had sent out a carelessly made copy. A question of importance in some countries is whether telegraph companies are under any responsibility of this class towards the receiver of the message, with whom of course they have no contract. This question has been dealt with in England on grounds which I venture to think too narrow, for reasons given in another work.[1]

Special duties of giving correct information: condition and warranty.

Accordingly we have, on principle, to see how the duty of accuracy in statement (as beyond and distinct from good faith) has been or may be imposed. Parties may impose it on themselves as much as they please. The truth of a particular affirmation, the existence in fact of a particular state of things, can be made a condition or term of a contract, and in several kinds of usual business contracts it is commonly done. Again, the existence of particular facts may be, and constantly is, made the subject-matter of a warranty, an agreement annexed to the contract and supported by the same consideration, but not being an integral part of it. The soundness of a horse offered for sale is the standing illustration, and as good as any. Divers "implied warranties" are annexed by law to the contract of sale,[2] but these

[1] The Law of Torts, 3rd ed. 1892, pp. 493-498.

[2] See ss. 109-118 of the Indian Contract Act, in the chapter on Sale of Goods, which sum up in a workmanlike manner the results of a great mass of English authorities.

are only the definition of what the parties are presumed, according to common experience and the reason of the thing, to intend The like may be said in all cases where warranties are implied by law. Moreover, express warranties always supersede any which would otherwise be implied on the same matter, as distinguished from the general duty of performing the contract. Thus we may say broadly that conditions and warranties are what the parties make them.

Duties imposed by law: no general duty of diligence in assertion.

Then what has the law imposed in the way of special duties, besides and beyond the conditions and terms of contracts? One thing we have already seen under the head of Fraud. The law might have made this much the positive duty, apart from any question of contract, of persons who for their own purposes volunteer statements for others to act upon in matters of business; namely, not that the statement shall be absolutely true, but that reasonable care shall be used to verify it before it is made. But it is now settled that such is not the law in England.[1] I am by no means sure that this, or something like it, does not represent what is now generally received in the United States.[2] But the view taken of this or that point of the Common Law in the United States, by however respectable authority,

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[1] By the decision of the House of Lords in *Derry* v. *Peek*; see p. 46 above.

[2] See *Southern Development Co.* v. *Silva* (1888) 125 U. S. 247, 250.

cannot have much practical effect in British India when it is in conflict with English decisions. We may like it or not, but English Courts must now decline to recognize a positive duty of using any, even the lowest, degree of diligence in making allegations about supposed matters of fact. We must go upon the bare issue of belief. Gross and palpable want of reasonable grounds may lead us to find that there was no belief at all; in other words, to say there was actual falsehood, the falsehood which is the necessary and specific badge of Fraud. But it will be fraud or nothing.

Rule as between contracting parties: I. C. A., s. 18.

Again, is there within the limits of the law of contract, and as between contracting parties, such a rule as we have just mentioned? Its non-existence outside the relation of contracting parties by no means proves that it may not be a rule in the law of contract. In this country there is no doubt that such a rule exists. For it is declared by the Contract Act[1] that:—

"Misrepresentation means and includes—

(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, although he believes it to be true."

And by s. 19 a party whose consent was caused by misrepresentation is entitled to avoid the contract.

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[1] IX. of 1872, s. 18.

The rule not well expressed.

This, like much else in the Contract Act, has been taken with too much deference and too little independent judgment from that much and justly criticized performance the Draft Civil Code of New York, which the lawyers of that State have hitherto succeeded in keeping out of their statute-book, although one or two Western States have adopted it. One cannot honestly commend the language. Nothing could be less happy than this popular use of the word "warranted" in a subject-matter where "warrant" and "warranty" have already such a burden of technical meaning to bear. But I suppose on the whole that "in a manner not warranted by the information of the person making it" is equivalent to "without any ground reasonably appearing sufficient, at the time when the assertion is made, to the person making it." And the rule seems a just and convenient one. Apart from any stricter rule as to the particular kind of contract in hand, a contracting party need give no more information than he chooses. But what he does give must be honestly given to the best of his knowledge, and founded on some sort of plausible evidence. Of course the general rule thus laid down does not exclude the far more stringent and minute rules as to disclosure of material facts which occur, as above hinted, in special classes of contracts. Of these the Contract of Insurance in its different branches is the most important.

English principle: duty of party as to what is specially within his own knowledge.

The declaration of the Contract Act is perhaps enough for most practical purposes outside the details of commercial law which, after all, affect but a small fraction of the people of India. But we can hardly think it a mere matter of curiosity whether it is or is not an extension of the law of England as regards the duties of contracting parties in general. I am not prepared to say that the Common Law does not go so far, but it would be difficult to justify the statement, in that precise form, by any existing authority. The truth is that the English authorities consist almost entirely of decisions on contracts of highly special classes mainly insurance and the sale of land, together with a certain number on family arrangements and the duties of good faith incumbent on partners and directors of companies. I do not doubt that a real general principle runs through all these authorities, but I think it will be found rather more cautious in one way, and a good deal wider in another, than the proposition of the Contract Act.

In some cases the material facts on a judgment of which the terms of a bargain depend are not more within one party's knowledge than the other; they may be equally well or ill known to both, or at any rate equally accessible to both. And in such cases the law does not impose any duty of disclosure, or of giving correct information, on either party. Whether the truth of any particular affirmation was a condition or term of the contract

is a matter of intention, and the intent of the parties must be collected in every case from the transaction taken as a whole. But in many cases the facts, or some of them, are exclusively, or at least eminently, within the knowledge of one party rather than the other. A shipowner insuring his ship may be expected to know a good deal more than an underwriter; a landowner selling his land may be expected to know a good deal more both about the title and about the condition of the property than any possible purchaser. Now in these cases, where the nature of the contract puts one of the parties in a position of advantage, English law expects not only that he shall not make an unfair use of his position, but something more. He must not only abstain from misleading; he must not keep back anything material that he knows. In all forms of insurance the assured is under a very large duty of disclosure, and the seller of land (or exceptionally the buyer, if he and not the seller is the person who knows the property) is bound to give a substantially accurate description of that which is for sale. A mere oversight may entitle the other party to avoid the contract. It would be quite possible, though I know not that it has ever been done by authority, to formulate this as a general principle, and exhibit the rules as to disclosure of facts on insurance, sale of land, and the like, as applications or developments of it in detail. For most

practical purposes these rules are hardly thought of except in connexion with their immediate subject-matter. Here in India there is nothing about sales of land in the Contract Act, but the duties of good faith between a seller and a buyer of immoveable property are laid down, substantially to the same effect as in the English books, in s. 55 of the Transfer of Property Act. The same section declares that an omission on either part to make the required disclosures is fraudulent: a harsh term to use without any discrimination of wilful concealment from mere inadvertence or even pure accident. The law of insurance has not yet been codified in this country, and the measure of that utmost good faith which ought to distinguish the contract of insurance has to be sought, as in England, in the text-books and reports. I am not aware that Indian case-law has made any material contribution to the subject. The duty of a guaranteed creditor to the surety not to misrepresent any material fact either actively or by concealment is broadly laid down in the Contract Act.[1]

The law really goes further than the words of the I. C. A. Peculiar clauses of s. 18 of the Act.

The result is that the first clause of s. 18 of the Contract Act is possibly a beneficent extension of the law in one direction, but in other ways comes far short of being an adequate expression of the

[1] IX. of 1872, s. 143. Dr. Whitley Stokes (note in 'The Anglo-Indian Codes,' i. 618) thinks this goes beyond English law. I do not see that it need be held to do so.

law, and does not at all indicate the principle on which the law is founded. Two other clauses follow it[1] which, I suppose, are not likely to do any harm. They are exceedingly ill framed, and it is most difficult to see to what cases they are intended to apply. In fact, the only definite notion they convey to the mind of an English lawyer is that the men who set their hand, in the New York draft of a Civil Code, to the work of codifying the Common Law, were not lawyers enough to understand the nature of the difficulties, nor sufficiently skilled in drafting (not to say the correct use of the English language in general) to clothe their meaning, when they had one, in apt words. Dr. Whitley Stokes[2] has adopted some former criticism of mine on these particular clauses, and I see no reason, examining them again after some years, to think any better of them. In one reported case,[3] however, the Bombay High Court saw its way to discovering a possible application for the second clause. We shall have to return to this case under the head of Mistake, to which it properly belongs. The decision was distinctly put on the ground that a deed containing a release had been executed under a total misapprehension as to its contents; the deed purporting to be in pursuance of a resolution of a creditors' meeting which did not

[1] See them in Appendix, pp. 137, 138.

[2] The Anglo-Indian Codes, i. 556.

[3] *Oriental Bank Corporation* v. *Fleming* (1879) I. L. R. 3 Bom. 242. See p. 116 below.

authorize the insertion of any such clause. Certainly there was a misrepresentation, namely by the debtors tendering the deed for execution as a deed framed in accordance with the resolution in question. But, in the first place, the deed was held to be absolutely void as regards the release; and, when this conclusion was once arrived at, it was quite immaterial in point of law whether the misrepresentation was made in good faith or not, and whether there had been any particular breach of duty. In the second place the misrepresentation was of the most direct and material kind, and well within the terms of the first branch of s. 18. It does not therefore seem possible to say that this case has shown the second branch to be of any practical utility.

On the whole this is one of the least satisfactory portions of the Contract Act. As the Act has now been in force for more than twenty years, the attention of the Legislative Department might well be turned to revising it. Dr. Whitley Stokes has already expressed the like opinion;[1] I need hardly add that his opinion carries a weight of experience which makes it at all events not unreasonable for a person who has not had the benefit of such experience to follow him.

Illustration of simple

A case[2] decided in the North-West Provinces not

[1] The Anglo-Indian Codes, i. 534.

[2] *Johnson* v. *Crowe* (1874) 6 N. W. P. 350.

misrepresentation: *Johnson* v. *Crowe.*

long after the Contract Act came into operation illustrates the effect of simple misrepresentation in avoiding a contract. The plaintiff wrote from Allahabad to the defendant at Cawnpore, asking him if he would undertake to load and forward a certain engine and boiler to Rajghat in the Dun, through Dehra Dun, and if so to send an approximate estimate of the cost. In this letter the plaintiff stated as follows:—"There are good roads metalled to within six or seven miles of the ghát, and a fair kutcha[1] road the remainder." Two days later the defendant replied as follows:—"I am making out an estimate for landing the engine and boiler at Rajghat in the Dun; my reasons for not sending it at once have been to make inquiries as to the means I can get to transport it from the railway station, Saharanpur, to the Dun." The parties agreed on Rs. 1400 as the sum to be paid.

It turned out that there was a bridge on the road which would not bear the weight of the boiler, and that the only thing to be done was to take the boiler round over the bed of the nala, which the bridge crossed. The defendant duly conveyed the engine, and received Rs. 1200, but declined to do anything more with the boiler; and the plaintiff, having transported the boiler at his own charge, sued the defendant for the amount

[1] "Kutcha" is a word of large Anglo-Indian utility. As applied to a road it means practicable but not metalled. This note may not be superfluous for readers at home, if I have any.

which he had expended by reason of the defendant not having fulfilled the whole of the contract. The real question between the parties was whether the defendant had acted in reliance on the plaintiff's statement about the road, or had, by the terms of his letter, taken on himself to make independent inquiries. No suggestion was made that the plaintiff's statement was wanting in good faith. The Court held that, in the result, the plaintiff had "innocently caused" the defendant "to suppose he would meet with no extraordinary difficulty in transporting the boiler and other parts of the engine over the nala crossed by the suspension bridge"; and that on this ground the contract was voidable. If this case had been dealt with under the Common Law, the decision would, I conceive, have been the same, but it would have been arrived at in a slightly different way.[1] The Court might and probably would have held that the plaintiff's assertion as to the state of the road was understood by the parties as a condition of the contract, like the affirmation in *Bannerman* v. *White*[2] that sulphur had not been used in the treatment of the hops which were the subject-matter of the sale in that

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[1] In truth the case ought to have been so dealt with, for the correspondence forming the contract took place in February and March, 1872, before the Contract Act was passed. The Act was passed on the 25th of April and came into force on the 1st of September, 1872

[2] 10 C. B. N. S. 844; 31 L J. C. P. 28.

case. Here the defendant undertook to transport the engine and boiler only on the assumption that there was a fair practicable road. He was entitled to say that he never contracted to take the boiler across a nála. With regard to the engine, which the defendant did forward to its destination, the correct view seems to be that in the circumstances there was a new contract for a reasonable reward. Whether the plaintiff was entitled to recover back any and what part of the Rs. 1200 which he had paid (apparently as on account of the original entire contract) could have been determined only by close examination of what passed, and what was the state of the parties' knowledge at the times when the several instalments were paid. As the suit was constituted, this was not before the Court and could not be decided.

As to misrepresentation of law.

There are some points about the nature and effect of misrepresentation in general, whether fraudulent or not fraudulent, which it will be most convenient to mention in this place. It is not uncommonly said that the misrepresentation which entitles a party to repudiate a contract (much more that which amounts to actionable fraud) must be a misrepresentation of fact. This proposition is understood to exclude on the one hand representations of mere expectation or opinion, and on the other hand representations in matter of pure law. Doubtless the first branch is sound.

A man can do no wrong by stating his opinion as an opinion, be it right or wrong. But it must be remembered that in practice an affirmation framed in terms of opinion or expectation is often understood, and not unreasonably understood, as implying the assertion that certain facts exist on which that opinion or expectation is founded. A well-known English case[1] of the beginning of this century deals with facts just on the dividing line, which gave rise to a difference of opinion in the Court. With regard to the other branch of the current statement, it does not seem that there is really any positive rule that one man cannot be entitled to rely upon another's representation of what the law is, or to complain if he is misled by it. On principle the true rule would rather seem to be analogous to that which, as we have seen, runs through all the classes of cases where the Common Law requires a special amount of openness and good faith between parties to contracts. Generally speaking, there is no reason to presume as between a seller and buyer, a letter and a hirer, a principal and agent, and so forth, that one party knows more of the law than the other, or has better means of ascertaining it. Where they are on a footing of equality, that which either of them may assert about a matter of law can be nothing

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[1] *Haycraft* v. *Creasy*, 2 East, 92; 6 R. R. 380. See further, Pollock on Torts, 3rd ed. 258-9.

more than his own opinion, an opinion which the other party will naturally be more likely to regard with a certain suspicion than to take for granted. But the case may well be altered if one party is a lawyer and the other a layman, or if one, and only one, is dealing in a business with which he is familiar, and which implies at least some empirical knowledge of the law relating to it, that of a banker or an insurance office for example. Again, I can see no reason for presuming equal knowledge of the law between a well-to-do man who can afford to take good advice and a poor and illiterate man dealing with him. In England this is more or less speculative opinion; but when we turn to British-Indian authority, there seems to be no doubt that in this country a distinct misrepresentation of matter of law will avoid a contract. A *kabuliyat* (answering to what we call the counterpart of a lease in England) containing a clause of re-entry, which had been represented by the zamíndár or his agent as a mere penalty clause, was declared by the Judicial Committee in a recent case[1] not to be the real agreement between the parties, and the zamíndár's suit was dismissed.

Liability of principal for misrepresentation by agent.

A question which has given some trouble in England is how far a principal who is personally innocent can be made liable for the fraud or mis-

[1] *Pertab Chunder Ghose* v. *Mohendra Purkait* (1889) L. R. 16 Ind. App. 233; I. L. R. 17 Cal. 291.

representation of his agent. So far as regards the effect of misrepresentation on the obligation of a contract, the terms of the Contract Act, s. 238, are too plain to leave any doubt in this country that the misrepresentation, fraudulent or not fraudulent, of an agent in the course of his employment is binding on the principal. This is believed to be also the rule of the Common Law. As regards an action for deceit independent of contract, the liability or non-liability of the agent will be determined by the state of his own knowledge. He will be liable as well as the principal if they both know the statement made by the agent to be false. If the principal, knowing the truth, has authorized a false statement, and the agent has made it not knowing the truth, in that case only the principal is liable. The difficult case is where the agent makes a statement which he honestly believes to be true, but which the principal has not specifically authorized him to make, and where the principal in fact knows the contrary to be true. The principal may, perhaps, have concealed the truth of set purpose from his agent, hoping and expecting that the agent will, innocently so far as concerns himself, make the misleading statement. Clearly this would be fraud in the principal. But if the principal has not purposely kept the agent ignorant of the truth, it is by no means clear that he can be charged with fraud. *Derry* v. *Peek*[1]

[1] Pp. 46, 54, above.

rather goes to show that he cannot; and one can hardly think that, since that case, it would be a much more hopeful undertaking to bring a suit against the principal for negligence, apart from either actual or constructive fraud, in not keeping his agent better informed. We must regard the problem raised by a case of this kind as still undetermined.[1]

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[1] *Cf.* Pollock on Torts, 3rd ed. 275-277.

CHAPTER V.

MISTAKE.

Mistake as an operative condition of legal consequences is abnormal.

HISTORICAL causes to which I have adverted in works already published, and with which it is needless to trouble Indian students, have caused the word Mistake to be surrounded in English law-books, down to recent times, with a kind of mysterious halo. Nay more, it is possible to find in utterances of highly respected writers, and in judicial deliverances of English Vice-Chancellors, expressions which seem to ascribe to Mistake a kind of magical power enabling the Court to upset any transaction whatever. I purposely forbear to refer more particularly to any of these loose and misleading phrases. It may be proper for an English law student to be put on his guard against them by chapter and verse. The less, in my opinion, an Indian law student can hear about them the better. In truth Mistake is not a substantive head of jurisprudence or legal practice at all. Mistake is neither more nor less than holding a wrong belief. It goes one degree beyond ignorance, which is the mere negation of know-

ledge. We may call Mistake, if we please, the active form of ignorance. The fact that a man holds and acts upon a wrong belief is a fact capable in various cases, and for various reasons, of being material. It is sometimes material and sometimes not. The cases in which it is material are important, but it does not seem to be possible to bring them under any single and universal formula. So far as we can start from any general conception, we must look for it, so to speak, on the reverse side of the shield. Legal principles and rules have to deal, in the first instance, with acts and events, not with states of mind. As between man and man, the question is not, under normal conditions, what my inward thought or belief may have been. Rather it is what I have given another man just cause to expect of me. The law regards as my intention that intention which a reasonable man, in the given circumstances, would infer from my words or acts. Everything that in private law we comprise under the head of interpretation, however minute and elaborate a discussion may be made necessary by the complication of human affairs, is or ought to be developed from this fundamental principle. Hence the operation of mistake, where it is operative, is abnormal or at least peculiar. In the law of contract, or rather of transactions including consent as a necessary element, we have cases enough of this kind to make a chapter of some importance. Otherwise, it cannot be too clearly

understood, there is no such thing as a general law of Mistake.

Relation of Mistake to Fraud and Misrepresentation.

We have been dealing with cases where one party to a transaction is led into mistake by the other. Where that other's act is wilful, a false assertion being made in bad faith with knowledge of the contrary truth or reckless and conscious ignorance whether the assertion be true or not, the case is one of Fraud. Where one party misleads the other without fraud, either by positive mis-statement or by omitting to disclose that which it is his duty to disclose, the case is one of Misrepresentation. Unless mistake is produced and acted upon, there cannot be fraud or misrepresentation in the direct and proper use of either term. But the duties and the conduct of the party misleading are generally more important for determining the legal consequences, and also more difficult to fix with accuracy, both in fact and in law, than the ignorance and ensuing ill-advised action of the party misled. Therefore Fraud and Misrepresentation, not Mistake, are so far the working titles of the law, and as such we have treated them. It remains for us to see how Mistake may have independent effects going even farther than those of Misrepresentation or Fraud. Consent obtained by misrepresentation, fraudulent or not fraudulent, is on that account voidable at most: that is, as we have explained, the transaction is valid unless and until rescinded; third

persons may acquire indefeasible rights, and the right to rescind may be lost by lapse of time. But certain kinds of Mistake may go to the very root of the matter and prevent any consent at all from being formed. In such a case there will be not a voidable contract but only the outward appearance of agreement, and no transaction of any real legal value. The seeming agreement is wholly void, and no person, not even an innocent third person giving value, can acquire any rights under it. Elsewhere[1] I have endeavoured to account for these cases, as recognized in English law, under three heads distinguished by the nature of the mistake: namely, according as the fundamental error is concerned with the nature of the transaction, or the person of the other party, or the subject-matter dealt with.

Cases where agreement nullified by Mistake.

In the first class of cases the error is generally on one side only, being due to fraud or at least misrepresentation. The type of these cases is where a man executes a deed under a total misapprehension of its nature and contents, or some material part thereof. In the second it obviously must be one-sided; for even in the barely possible case that A deals with B, taking B for X, while B also takes A for Z, there would not be a common error, but two distinct errors of which either might suffice to prevent a real agreement from being

[1] In "Principles of Contract," Ch. ix.

formed. A mistake of this kind may occur in good faith: but the most important cases are those where a person of no substance fraudulently obtains property or credit by leading another to believe that he is dealing with a known and solvent party.[1] In the third class we shall find that one-sided error is seldom if ever material unless it has been caused by the other party. Moreover we come round, in dealing with facts of this class, to questions which really are of construction or at any rate of interpretation in the larger sense. Either it turns out that the parties were at cross purposes, or a common assumption as to some vital matter of fact is frustrated by events unknown to the parties. Equivocal or ambiguous terms may, in rare cases, make the show of a complete consent between parties who never meant the same thing.[2] But more commonly we have an attempted dealing with something which does not exist; a cargo supposed to be on its way in due course, but which has been lost or spoiled, or an interest in property depending on the life of some one whom the parties suppose to be alive, but who is dead. This last class of cases is the only one of which notice is taken in the

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[1] *Cundy* v. *Lindsay*, 3 App. Ca. 459, is now the leading authority.

[2] *Raffles* v. *Wichelhaus*, 2 H. & C. 906, is believed to be an almost unique example. See Mr. (now Sir Howard) Elphinstone on this point in L. Q. R. ii. 110.

illustrations to s. 20 of the Indian Contract Act,[1] though it is perhaps that one which has least need of any special doctrine about Mistake to explain it. Further, it will be observed that this section does not in terms cover the case of a fundamental error going either to the nature of the transaction intended to be entered upon or to the person of the party supposed to be dealt with. But it is sufficiently implied in the conditions laid down by s. 10 for the formation of a binding contract that there can be no contract where there is no real consent.

Indian authorities.

We need not expect to find many recent authorities affirming the principles I have now endeavoured to recapitulate. They are too well settled to be called in question except by accident. Indian decisions do, however, afford a certain number of examples both to show that Mistake will not generally create, of itself, any right to relief, and to illustrate the conditions under which it becomes material for special reasons.

Mere unfounded expectation as to future events is not a mistake of fact, nor can it be the more so because it is common to both parties.

A lease is not avoided by an increase of the Government assessment, although the parties at the date of the lease entertained an erroneous

[1] See it in Appendix, p. 139.

expectation that the assessment would not be enhanced.[1]

A compromise will not be set aside because the view taken by the parties of a point of law capable of doubt at the time has ultimately turned out to be erroneous.[2] This is manifestly just, for it is in the very nature of a compromise that the parties agree not to fight out a matter in difference of which the result appears, at the time, doubtful. Whether the questions be of fact or of law, the parties might otherwise bring them before a Court, and the Court would have to decide them: and from the legal point of view there must at all times have been some correct solution, however difficult to arrive at. But this does not prevent the law from recognizing that as a matter of common sense and prudence questions are often really doubtful, and it is reasonable for the parties to settle them by mutual concessions.[3] And the reason of the thing remains the same even where there is a common mistake on some point which is not of such importance as to go to the root of the whole matter. In the Indian case referred to the parties had, erroneously as it afterwards appeared, supposed that, where a decree in a suit had awarded a sum without specifying interest, the judgment

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[1] *Babshetli* v. *Venkatarámáná* (1879) I. L. R. 3 Bom. 154.

[2] *Seth Gokul* v. *Murli* (1878) I. L. R. 3 Cal. 602, in P. C.

[3] *Cp. Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. Div. 266.

debt would carry interest which would be recoverable in proceedings by way of execution. By the express terms of the Contract Act, s. 21, mistake as to any law in force in British India does not render a contract even voidable.

A mere clerical slip which does not in fact mislead any one can still less be treated as a material error avoiding a contract or preventing its formation.[1]

On the other hand, where a compromise was made under the sanction of the Court, but it turned out that all parties were under a mistake as to material facts, the compromise was set aside.[2] The Court seem to have thought it necessary to hold that the mistake was in some degree negligent. The question would seem to be rather whether the subject-matter of the mistake was part of the matter in difference, or (so to speak) an external fact or set of facts assumed by the parties as one of the conditions determining their position with relation to the business in hand. If one party had in any way misled the other, considerations of a different order would of course come into play. Negligence, at all events, can hardly be material in cases of this class except, possibly, where a negligent act or omission is such as to work an

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[1] *Mahomed Bhoy Puddumsee* v. *Chutterput Sing* (1893) I. L. R. 20 Cal. 854

[2] *Bibee Solomon* v. *Abdool Azeez* (1881) I. L. R. 6 Cal. 687, 706.

estoppel. Recent English authority does not seem to be in favour of even this exception.[1]

Then we have, in a case decided by the High Court of Bombay, an important illustration as to the manner in which pure and simple mistake as to the nature of the transaction undertaken may nullify an apparently regular and formal act. In *Oriental Bank Corporation* v. *Fleming*[2] the defendants' firm had suspended payment. The plaintiffs were creditors. At a creditors' meeting it was resolved that there should be a voluntary liquidation under the supervision of a committee; at a subsequent meeting this was confirmed (with a variation immaterial for the present purpose), and it was resolved that a composition deed should be prepared in pursuance of the resolution. It was stated that the whole assets would be handed over to trustees for the creditors, and nothing was said about a release of the debtors. Some days later one of the debtors tendered a deed for execution to the respective agents of the plaintiffs; they were engaged with English mail business and desired further time to examine the deed; the debtor, however, pressed them to execute it at once, on account of the importance of losing no time, and assured them in identical, or almost identical, terms that it contained nothing but what was agreed to

[1] See *Onward Building Society* v. *Smithson*, in C. A., '93, 1 Ch. 1, 13, 14.

[2] I. L. R. 3 Bom. 242 (1879).

at the creditors' meeting. On this assurance the plaintiffs' agents executed the deed. In fact it contained a release of the debtors.[1] The next day the deed was produced and read to settle a difficulty which had arisen on another point, and on discovering that it contained a release the plaintiffs' agents severally, but all within a short time, repudiated their signatures and declared that their principals would not be bound. No charge of fraudulent intention was made, but the plaintiffs argued that the deed which their agents had manually executed was a deed wholly different in effect from that which they were authorized to execute, and believed that they were executing, and that consequently it was not their deed at all. This argument prevailed, and it was declared that the deed in question was not the deed of the plaintiffs so far as it purported to operate as a release. In the peculiar circumstances (assuming that negligence could have been material) there was no negligence on the part of the plaintiffs' agents in executing the deed without examination. As between the plaintiffs and the defendants, the defendants, having represented the deed as containing nothing beyond the resolutions of the creditors' meeting, would no doubt have been estopped from setting up the release ; but it would

[1] The terms of this release are not stated anywhere in the report. It must be taken that it was an unconditional release of the existing debts of the firm.

not have sufficed to decide the case on this ground, as it would not have protected the plaintiffs against any possible claims of third persons. The Court also held, it would seem superfluously, that the case fell within clause 2 of sec. 18 of the Contract Act.[1]

Rectification of instruments.

An important branch of jurisdiction which deals with Mistake (involved, it may be, with fraud, but this is exceptional) is the rectification of instruments; that is, the authoritative emendation of their language by order of the Court, for the purpose of bringing them into accordance with the true intention of the parties which they have failed to express. What makes this a rather delicate matter, as well as an important one, is the danger of allowing people to escape from their deliberate undertakings by allegations, easily made after the event, that they meant something different. Instruments regularly prepared and freely executed are presumed to represent the real intention of the parties, as in fact they do in the vast majority of cases. Mere assertion of the contrary by one party will not suffice to prevent that which the parties have concurred in expressing as their intention from taking effect according to its terms. Before the Court can interfere, it must be satisfied by clear proof that the parties really had formed, and intended to embody in the

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[1] See p. 99 above.

nstrument of which rectification is claimed, an agreement with which the instrument, as it has been drawn, is not consistent. Such proof may be forthcoming in the shape of a written memorandum, draft, or other preliminary document agreed to by the parties, and laying down the substance of what was to be formally and finally expressed by the instrument in question. Any draft, memorandum, or the like, not agreed to by both parties, but showing only what one of them intended, would of course not be admissible. In the absence of any written record of the intention which ought to have been carried out, oral evidence may be admitted, but with great caution. We shall presently have to compare the language of the Specific Relief Act with the law, or at any rate usage, of English Courts on this point.

When it is once established that the formal instrument does not express the real intention of the parties, and it is also shown by sufficient evidence what that real intention was, it matters little, as regards the positive right to relief, how the mistake in framing the formal instrument is accounted for. The person entrusted with framing it, or a copyist, may have simply blundered through unskilfulness or ignorance of his business. I do not now refer to mere slips in drafting which are obvious on the face of the document, and can be corrected by the general intention appearing in the context. These can be

dealt with by the Court under its ordinary power and duty of interpreting the expressed intention of the parties, and are in no need of any special remedy. But clauses making a wider disposition of property than the parties intended, or altering the effect of other dispositions in a manner not intended or desired, may find their way into a deed by the incompetence or inadvertence of the persons employed.

In some cases English judges have strongly censured professional negligence of this kind which has caused innocent parties to incur great trouble and expense. Lord Justice Knight Bruce said in such a case: "These licensed pilots" (*i.e.* "a series of professional gentlemen in the north of England") "undertook to steer a post captain" (one of the principal parties was a captain in the Navy) "through certain not very narrow straits of the law, and with abundance of sea room ran him aground on every shoal that they could make."[1] If one party undertakes to frame an instrument, acting for the other party as well as himself, and the other does not give him definite instructions, but trusts him to do what is proper and usual, he is specially bound to be competent or competently advised, at all events to the extent of not making mistakes in his own interest. Here it may not be

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[1] *Walker* v. *Armstrong* (1856) 8 De G. M. & G. 531, 538, per Knight Bruce, L. J.

necessary to show that the mistake was common. For the defaulting party is really in a dilemma. The question whether the instrument is in truth of a proper and usual kind is, we have to suppose, in the first place decided against him. Otherwise there would be nothing calling on him for an answer. Were he to say: "The deed as I framed it, and procured the other party to execute it, may be what you call proper or not, but there is no mistake of mine; it is exactly what I meant it to be": then he would be charging himself with something very like fraud, and so his last state would be worse than his first. This class of cases, however, is exceptional.[1]

It may be worth while to note that a serious doubt whether the legal effect of an instrument, as it stands, does or does not carry out the true intention of the parties, is sufficient ground for reforming that instrument, and it is not necessary for the Court actually to decide the point of construction.[2]

Specific Relief Act.

In British India this jurisdiction is defined by the Specific Relief Act (I. of 1877), ss. 31-34.[3] This chapter has, unfortunately as I venture to think, been founded on the corresponding portion

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[1] See *Loyesy* v. *Smith* (1880) 15 Ch. D. 655; *Tucker* v. *Bennett* (1887) 38 Ch. Div. 1.

[2] *Walker* v. *Armstrong*, 8 De G. M. & G. 531. This appears to me to be the real point of the case; I cannot see that it has much bearing on s. 33 of the Specific Relief Act, where it is cited in "The Anglo-Indian Codes."

[3] See these sections in Appendix.

of the draft New York Civil Code.[1] No reader trained in conveyancing or accustomed to good parliamentary drafting can regard the language as happy; and the attempt of s. 31 to include cases of fraud, inducing error which may be fundamental, on the same footing as cases of what the section calls "mutual" (meaning thereby common) "mistake," is perhaps less happy still. The High Courts fortunately remain capable of distinguishing mistake from fraud. In a modern Indian case where a defence of fraud as to part of the property comprised in a registered *kabuliyat* was set up to a suit for arrears of rent on the whole, the Court held that the defendant's proper remedy was a suit to have the written contract rectified under s. 31 of the Specific Relief Act.[2]

The 32nd section of the Act is a striking example of the misguided ambition that pervades the New York draft. When a modern legislator forgets that his business is not to preach but to enact, his clauses, if they are not happily inoperative, can only raise useless difficulties. In this case, for example, what is the "equitable and conscientious agreement" which the Court must be satisfied that the parties intended to make? Is it something more than a lawful agreement? And

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[1] Whitley Stokes, The Anglo-Indian Codes, i. 973.

[2] *Anarullah Shaikh* v. *Koylash Chunder Bose* (1881) I. L. R. 8 Cal. 118.

if so, what are the additional elements? On what authority this section is supposed to be founded I know not. S. 33 is an almost superfluous piece of caution. If the jurisdiction were limited to cases in which there has been an incorrect copying of the document actually executed from a correct draft, or something equivalent, it would hardly be worth declaring. Under s. 31 the Court must "find it clearly proved that there has been fraud or mistake in framing the instrument," but nothing is said as to the extent to which oral evidence is admissible. Here, as on some other points formerly mentioned, we must have recourse to the Evidence Act (I. of 1872). The first proviso of s. 92 seems to cover the ground :— Evidence Act.

"Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud . . . or mistake in fact or law."

If this means that oral evidence can be indiscriminately admitted to show that the terms of a written document do not express the true intention of the parties, it goes far beyond the cautious rules of English Courts on the subject. In England the point is well settled, on the general principle of the old Court of Chancery not to act in the plaintiff's favour where there is a bare personal conflict of testimony between him and the defendant, "oath against oath" as it was called. Oral evidence of the real intention of the parties at the time when the instrument was prepared is admitted if it is

clear and uncontradicted. But such evidence is not sufficient against a party who positively denies the alleged mistake.[1] We cannot say that this distinction is recognized by the test of the Specific Relief Act or the Evidence Act, and it would perhaps be difficult to maintain that the Courts of British India are in strictness bound to observe it. But there is no reason why they should not practically continue to observe it, not as a rule of positive law, but as a precept of what is sometimes called judicial prudence. Again, in this case the text of the Acts is inadequate. The legislature neither confirms nor abrogates the unwritten tradition of the Courts, but leaves it to make the best it can of being in possession. The result is that the Codes may be positively misleading to any reader who has not had an independent legal training.

Mistake as defence to suit for specific performance.

We have already seen that the remedy of specific performance is discretionary, though the discretion by which it is administered is judicial and not arbitrary. Parties cannot claim it as a matter of common right in the same way as a judgment for damages. The plaintiff has not done enough when he has shown that there is a legally binding contract of a kind for which specific performance is an

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[1] It would seem, notwithstanding *Olley* v. *Fisher*, 34 Ch. D. 367, that the rule is independent of the Statute of Frauds. See authorities in the present writer's "Principles of Contract," pp. 494, 495 5th ed.

appropriate remedy. He must satisfy the Court that he has not only a legal right but a meritorious case. In the old-fashioned phrase, he must come into Court with clean hands. Therefore defences are allowed in a suit for specific performance which are not allowed in a suit for damages. It is needless to enter here upon the historical reasons for this. The law and practice are well settled, and in this country are embodied in the Specific Relief Act.[1] One available defence is that the terms of the contract sued upon do not express the real agreement between the parties. The defendant need not show that the mistake was common to both parties, or that the real agreement is or ever was enforceable.[2] But if the plaintiff in a case of this kind admits the variation contended for by the defendant, specific performance of the real agreement so admitted may be granted.[3] On the other hand a plaintiff who attempts to enforce a clear written contract with alleged variations which he fails to prove may be compelled to accept perform-

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[1] I. of 1877. See especially ss. 21, 22, 26, 28. They are set out in the Appendix to this volume.

[2] The latter part of the note in Whitley Stokes's "Anglo-Indian Codes," i. 969, note 2, is not universally applicable. It may be, as in *Townshend* v. *Stangroom* (1801) 6 Ves. 328, 5 R. R. 312, that neither the apparent nor the real agreement can be enforced by way of specific performance.

[3] *Martin* v. *Pycroft*, 2 De G. M. & G. 785.

ance of the agreement according to its terms as they stand, and to pay the costs of the suit.[1]

Specific Relief Act, s. 26.

The provisions of the Specific Relief Act on this subject are open, in point of form, to the remark that they make the Legislature speak something too much in the manner of a text-book and too little with the authority of enacted law. One clause is hardly clear on the face of it to the reader unfamiliar with the English authorities. By clause (*c*) of s. 26 the Court is to refuse specific performance, as against a defendant insisting on a variation, "where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil." In part this overlaps the provisions of the Contract Act as to misrepresentation, for its terms manifestly cover some cases where the contract would be voidable. It was needless to say that voidable contracts will not be specifically enforced. Beside and beyond cases of that kind, the clause appears to be directed to questions of the class dealt with in *Lamare* v. *Dixon*[2] and *Angell* v. *Duke*;[3] for I submit that,

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[1] See the corrected report of *Fife* v. *Clayton* in 9 R. R. 220, and *Higginson* v. *Clowes*, 15 Ves. 516, 10 R. R. 112.

[2] L. R. 6 H. L. 414.

[3] L. R. 10 Q. B. 174.

notwithstanding the widely different language employed in the House of Lords, sitting as a Court of equity, and in the Court of Queen's Bench, there is no substantial difference between a "representation" and a "collateral agreement" when it is admitted that neither of them is a warranty. The truth is that in England the Statute of Frauds has prevented the judges from treating collateral assurances as to the state of property sold or let, or something which the seller or lessor undertakes to do with regard to the premises, as being terms in the contract itself, and they have been driven to be astute to give effect to such agreements. My own opinion is that the method struck out by the Court of Queen's Bench, unaided by the refinements of equity, is more straightforward than the rather nebulous discourse about "representations" which has proceeded (we must admit) from very high authority. But the discussion seems not worth pursuing in British India. Here the Statute of Frauds has ceased from troubling honest men even within the jurisdiction of the High Courts, and there seems to be no reason why we should resort to the devices begotten of it in England. It seems enough to say that a party claiming specific performance must be ready and willing to perform the whole of what he undertook on his part, whether the whole agreement appears on the face of one document or not; and that the defendant

must always be at liberty to show what the whole and every part of the agreement really was.

Recovery of money paid under mistake.

There is yet another class of cases in which mistake is extensively remedied in English law; and that, curiously enough, not by any of the special methods of equity jurisdiction, but by a development of purely common-law forms in the period made illustrious and fruitful by the genius of Lord Mansfield. Money paid on a supposed consideration which has wholly failed can be recovered back as money "had and received" for the use of the payer by the person to whom it was paid, the fiction of law being that he received it as a trustee[1] for the person paying it. And perhaps the commonest manner in which such failure of consideration occurs is that the payment is made under a mistake of fact. Here the mistake is a condition rather than the primary ground of the party's right to recover. If a man pays money of his free will, having full knowledge of the facts, he cannot say that there has been any failure of consideration. And it will not help him if he acted on an erroneous opinion of the law. The man who has chosen to judge his own cause upon all the facts, and has decided against himself, cannot appeal to the Court against

[1] This term could not be used in English common-law pleadings. There is no reason why we should not use it here. The action has always been called an equitable action.

his own judgment, whether it was well informed or not. On the other hand it is immaterial, when a mistake of fact is once proved, whether it was free from negligence or not All these points have long been settled law; moreover the duty to repay money received by mistake is unaffected by the fact, if so it be, that the receiver has paid it over to some one else. He is not discharged, as against the person paying, by having received the money as an agent and paid it over to his own principal, however innocent his conduct may have been. So it has been held in India, following English authority.[1]

This duty is referred in English books to the head of "contracts implied in law," not as the result of any deliberate classification, but because a fictitious promise of the defendant to repay the money he had received from the plaintiff was the only machinery by which such a duty could be brought within the forms of pleading known to the common-law system of procedure. In the Indian Contract Act it is simply and positively declared in the chapter "of certain relations resembling those created by contract."[2]

Effects of Mistake in criminal law

It would not be profitable to enter in this context upon the relation of mistake or ignorance of

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[1] *Shugan Chand* v. *Government N. W. P.* (1875) I. L. R. 1 All. 79.
[2] IX of 1872, s. 72.

fact to criminal liability. The points that arise for consideration are very different from those which have to be dealt with in determining the existence and extent of civil obligations; and I do not think any sensible gain would be derived from a minute comparison. Ignorance or mistake of fact is sometimes, by no means always, an excuse for an act or omission forbidden by law.[1] Penal law may be said to be wholly statutory in British India, and it is to a great extent statutory even in England, if we take into account the multitude of Acts of Parliament which, in the interest of public order or health, create special duties and impose penalties for their infraction. Much must depend on the language of the enactment defining each particular offence, especially when the question is of a breach of purely statutory duties, and not of acts criminal in themselves. On the whole the cases where mistake is capable of being an excuse would seem to fall mainly into two divisons. First, knowledge of certain facts may be, by the definition of an offence, a necessary element in it. Where this is so, the offence cannot be committed by a person ignorant of those facts; just as, if it is declared that an act done with a certain intention is an offence, not only the act but the intention must be proved. But where the act

[1] *Cp.* Mr. J. D. Mayne's Commentary on the Penal Code, s. 79.

which is declared to be an offence is obviously wrong in itself, that is, contrary to the received and well-known rules of morality, the Court will not be disposed to construe statutes in this sense if there is any doubt. The maxim that penal statutes must be strictly construed is no longer a safe guide, if it ever really was. Next, a man may do that which on the face of it is criminal or punishable, and would certainly be criminal or punishable if he knew all the facts, and he may be led to do it by a mistaken belief that a state of things exists which, if it really existed, would make his act not only dispunishable but lawful. Here ignorance, if not so unreasonable as to be culpable, may be an excuse as regards criminal liability. The only question of civil liability that can well arise is whether an act of this kind done by an agent will make his principal liable; and that question, when it arises, depends not on any special consideration of Mistake, but on the nature and extent of the agent's authority to judge and act in his principal's place and for his interests. That the actor himself is at all events civilly liable is not open to doubt. Here again it may be that the Legislature, for reasons of policy, has in the particular case intended and enacted that a man shall be bound to know certain kinds of facts at his peril. Such an intention is not to be lightly supposed, but if it appears to be the true intention as collected

from the language employed, the Court must give effect to it, however severely it may operate in any particular case. We must not forget that the hardship may be only apparent. There are such things as notorious offences of which it is most difficult to obtain legal proof. For the repression of these it may be a wise and necessary policy to lighten the burden of the prosecution, and indulgence on the part of the Court in over-much tenderness for what is called the liberty of the subject may be cruelty to the peaceful and law-abiding subjects who after all are the majority. On the whole the only rule that can safely be given on this ground without minute discussion is to beware of generalities.

The Anglo-Indian Codes.

It has been necessary in the course of these pages to criticize various portions of the Anglo-Indian Codes with some freedom. Legislative work of such magnitude and novelty cannot in the nature of things be free from irregularities and faults, and it is not my desire or meaning to disparage the codifying statutes of British India as compared with performances of the same kind in other countries. If such a comparison could be systematically undertaken, I am disposed to think that the result would not be unfavourable to our Indian legislation as a whole. But in technical work of this kind, work in which only a small number even of the legal profession take much interest, vigilant criticism and discussion become a

positive duty for that small number, and are among the indispensable conditions of the continuous efficiency and improvement which a highly organized Government has a right to expect of its professional services.

APPENDIX.

THE INDIAN EVIDENCE ACT, 1872.

(No. I. OF 1872.)

Chapter VII.—Of the Burden of Proof.

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111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence.

Illustrations.

(*a*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

THE INDIAN CONTRACT ACT, 1872.

(No. IX. OF 1872.)

Chapter II.—Of Contracts, Voidable Contracts and Void Agreements.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Consent" defined.

14. Consent is said to be free when it is not caused by—

"Free consent" defined.

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section, 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

"Coercion" defined.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

"Undue influence" defined.

16. "Undue influence" is said to be employed in the following cases:—

(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained.

(2) When a person whose mind is enfeebled by old age, illness or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

"Fraud" defined.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or

by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true ;

(2) the active concealment of a fact by one having knowledge or belief of the fact ;

(3) a promise made without any intention of performing it ;

(4) any other act fitted to deceive ;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

(*a*) A sells, by auction, to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(*b*) B is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B if the horse is unsound.

(*c*) B says to A—"If you do not deny it, I shall assume that the horse is sound ;" A says nothing. Here A's silence is equivalent to speech.

(*d*) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

"Misrepresentation" defined.

18. "Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person commit-

ting it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Voidability of agreements without free consent.

19. When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(*a*) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(*b*) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the account of the factory, which shows that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(*c*) A fraudulently informs B that A's estate is free from

incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(*d*) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(*e*) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations.

(*a*) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(*b*) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(*c*) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Effect of mistakes as to law.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Illustrations.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France: the contract is voidable.

Contract caused by mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Chapter IV.—Of the Performance of Contracts.

Consequences of rescission of voidable contract.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

* * * *

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to the non-performance caused thereby.

Illustration.

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Chapter VIII.— Of Indemnity and Guarantee.

Guarantee obtained by misrepresentation invalid.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid.

Guarantee obtained by concealment invalid.

Illustrations.

(*a*) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(*b*) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

THE SPECIFIC RELIEF ACT, 1877.
(No. I. OF 1877.)

Chapter II.—Of the Specific Performance of Contracts.

* * * *

21. The following contracts cannot be specifically enforced :—

(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(*c*) a contract, the terms of which the Court cannot find with reasonable certainty;

(*d*) a contract which is in its nature revocable;

(*e*) a contract made by trustees either in excess of their powers or in breach of their trust;

(*f*) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;

(*g*) a contract the performance of which involves the per-

formance of a continuous duty extending over a longer period than three years from its date;

(*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

Illustrations.

to (*a*).—A contracts to sell, and B contracts to buy, a lákh of rupees in the four per cent. loan of the Government of India.

A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1,000 per chest.

In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000, and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced, for in the first and the second both A and B, and in the third A, would be reimbursed by compensation in money.

to (*b*).—A contracts to render personal service to B.

A contracts to employ B on personal service.

A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A, and the other by B. A and B each name a valuer, but before the valuation is made, A instructs his valuer not to proceed.

By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London.

A lets land to B, and B contracts to cultivate it in a particular manner for three years next after the date of the lease.

A and B contract that, in consideration of annual advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A when cut and ready for delivery.

A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B, he will paint a picuture for B.

A contracts with B to execute certain works which the Court cannot superintend.

A contracts to supply B with all the goods of a certain class which B may require.

A contracts with B to take from B a lease of a certain house for a specified term, at a specified rent, if the "drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach.

A contracts to marry B.

The above contracts cannot be specifically enforced.

to (*c*).—A, the owner of a refreshment-room, contracts with B to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

to (*d*).—A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for if it were so performed, either A or B might at once dissolve the partnership.

to (*e*).—A is a trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders They contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, A and B, empowered to sell trust property worth a lákh of rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

to (*f*).—A company existing for the sole purpose of making and working a railway, contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced.

to (*g*).—A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine-power, and that A should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

to (*h*).—A contracts to pay an annuity to B for the lives of C and D. It turns out that, at the date of the contract, C, though supposed by A and B to be alive, was dead. The contract cannot be specifically performed.

Discretion as to decreeing specific performance.

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations.

(*a*) A, a tenant for life of certain property, assigns his interest therein to B. C contracts to buy and B contracts to sell that interest. Before the contract is completed A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact and C did not, specific performance of the contract should be refused to B.

(*b*) A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact the value of C's interest depends on the result of certain partnership accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(*c*) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

(*d*) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations.

(*e*) A is entitled to some land under his father's will on condition that if he sells it within twenty-five years, half the purchase-money shall go to B. A, forgetting the condition, contracts, before the expiration of the twenty-five years, to

sell the land to C. Here, the enforcement of the contract would operate so harshly on A, that the Court will not compel its specific performance in favour of C.

(*f*) A and B, trustees, join their beneficiary, C, in a contract to sell the trust estate to D, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(*g*) A, the owner of an estate contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to the unknown property.

(*h*) A contracts with B to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(*i*) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(*j*) A contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(*k*) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The Court cannot compel B to supply the goods, but if he does not supply them A may be ruined, unless he is

allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration.

A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

* * * *

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely):—

(*a*) Where by fraud or mistake of fact the contract of which performance is sought, is in terms different from that which the defendant supposed it to be when he entered into it;

(*b*) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff;

(*c*) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

(*e*) when the parties have, subsequently to the execution of the contract, contracted to vary it.

Illustrations.

(*a*) A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs. 1,000. In a suit by D, to make A, B and C separately liable each to the exten

of Rs. 1,000, they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint bond for Rs.1,000. D can obtain the performance sought only with the variation thus set up.

(*b*) A sues B to compel specific performance of a contract in writing to buy a dwelling house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.

(*c*) A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract, B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the written contract, except with the variation set up by B.

(*d*) A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

(*e*) A contracts in writing to let a house to B, for a certain term, at the rent of Rs.100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with B's consent, A pulls it down and erects a new house in its place, B contracting orally to pay rent at Rs.120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

* * * *

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases

(*a*) If the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with

other circumstances evidence of fraud or of undue advantage taken by the plaintiff.

(*b*) If his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled.

(*c*) If his assent was given under the influence of mistake of fact, misapprehension or surprise. Provided that, when the contract provides for compensation in case of mistake, conpensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

Illustrations.

to clause (*c*). A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed.

A directs an auctioneer to sell certain land. A afterwards revokes the Auctioneer's authority as to 20 bíghás of this land, but the auctioneer inadvertently sells the whole to B, who has not notice of the revocation. B cannot enforce specific performance of the agreement.

Chapter III.—Of the Rectification of Instruments.

31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Illustrations.

(*a*) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.

(*b*) By a marriage-settlement A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators, and assigns, during A's life, an annuity of Rs. 5,000. C dies insolvent and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

Intent of parties.

32. For the purpose of rectifying a contract in writing; the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principles of rectification.

33. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Specific enforcement of rectified contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint, and the Court thinks fit, specifically enforced.

Illustration.

A contracts in writing to pay his attorney B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

Chapter IV.—Of the Rescission of Contracts.

35. Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :— **When rescission may be adjudged.**

(*a*) Where the contract is voidable or terminable by the plaintiff.

(*b*) Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff.

(*c*) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations

to (*a*).—A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

to (*b*).—A, an attorney, induces his client, B, a Hindú widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

36. Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made. **Rescission for mistake.**

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly. **Alternative prayer for rescission in suit for specific performance.**

Court may require party rescinding to do equity.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

THE TRANSFER OF PROPERTY ACT, 1882.

(No. IV. OF 1882.)

Chapter II.—Of Transfers of Property by act of Parties.

* * * *

Fraudulent transfer.

53. Every transfer of immovable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated, or delayed.

Where the effect of any transfer of immovable property is to defraud, defeat, or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

Chapter III.—Of Sales of Immoveable Property.

* * * *

Rights and liabilities of buyer and seller.

55. In the absence of a contract to the contrary . . . .

(1) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ; . . .

(5) The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ; . . . .

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (*a*), and paragraph (5), clause (*a*), is fraudulent.

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